89-1667

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAY PALMER, et al.,
Petitioners,

v.

BRG OF GEORGIA, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented

1. Whether concerted action between competitors is per se illegal price-fixing or market allocation under Section One of the Sherman Act, when the defendants' purpose is to "allocate" rather than "divide" markets and to increase 500% and share rather than literally "fix" prices.
2. Whether a Sherman Act plaintiff in a Section One "Rule of Reason" and Section Two conspiracy to monopolize case necessarily must submit structural evidence to prove specifically-defined markets.
3. Whether the unexplained disparity between the majority and dissenting opinions below describing the contents of the summary judgment record, and the

applicable summary judgment standard, is so great as to suggest a departure from accepted judicial standards, requiring exercise of this Court's supervisory power.

List of Parties and Rule 29.1 Statement

The petitioners herein are: JAY L. PALMER, MICHAEL L. CHIDESTER, TERI L. POWERS, DAVID DUNBAR, and WILLIAM R. FERGUSON. In addition, BENJAMIN M. FIRST was party to the proceedings in the courts below. They seek to represent a class of purchasers of respondents' bar review course in northeast Georgia between 1984 and the present.

The respondents herein, each of whom was a party to the proceedings below, are as follows: BRG OF GEORGIA, INC., BAR REVIEW GROUP, INC., BRG PUBLICATIONS, INC., HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC., and RONALD O. PELLETIER.

Harcourt, Brace, Jovanovich Legal and Professional Publications, Inc., is a subsidiary of Harcourt Brace Jovanovich,

Inc.

The Department of Justice, representing the United States, submitted an amicus curiae brief in the Court of Appeals, supporting Plaintiffs'-Petitioners' request for en banc rehearing.

Bryan Downs, representing the Student Bar Association of the University of Georgia School of Law, and Margaret Murphy, representing the third year class of that school, submitted an amicus curiae brief in the court of appeals, supporting the request for en banc rehearing.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, purchasers of defendants' comprehensive Georgia bar review course, respectfully pray that a writ of certiorari issue to review (i) the judgment of the United States Court of

Appeals for the Eleventh Circuit, entered in this action on June 7, 1989, as amended on January 29, 1990, and (ii) the Order of the Court of Appeals, dated January 29, 1990, denying petitioners' petition for rehearing and suggestion of rehearing en banc.

OPINIONS BELOW

The original majority and dissenting opinions of the United States Court of Appeals for the Eleventh Circuit are reported at 874 F.2d 1417 and are reproduced as Appendix A at App. pp. 1-129.

The opinion and Order of the United States Court of Appeals for the Eleventh Circuit amending the above majority opinion and denying rehearing and rehearing en banc is reported at 893 F.2d

293 and is reproduced as Appendix B at App. pp. 129-133.

The opinions of the District Court for the Northern District of Georgia, dated January 9 and July 16, 1987, granting summary judgment to defendants are not reported and are reproduced as Appendix C at App. pp. 134-161, Appendix D at App. pp. 164-165, and Appendix E at App. pp. 166-178.

The Order of the United States Court of Appeals for the Eleventh Circuit granting the Motion of the United States of America for leave to file a Brief Amicus Curiae In Support of Rehearing En Banc is not reported and is reproduced as Appendix F at App. pp. 179-180.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 7, 1989. A timely petition for rehearing and a Suggestion of Rehearing en banc were denied on January 29, 1990. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections One and Two of the Sherman Antitrust Act, 15 U.S.C. 1 and 2, provide in relevant part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...." (15 U.S.C. §1)

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed [to have

violated this Act]...." (15 U.S.C. §2).

Rule 56, F.R.Civ.P., provides in relevant part as follows:

"...The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..."

STATEMENT OF THE CASE

Between 1976 and March, 1980, respondents BRG of Georgia, Inc. and/or its predecessor corporations and their owner, respondent Pelletier (hereinafter, "BRG"), competed directly against respondent Harcourt, Brace, Jovanovich Legal and Professional Publications, Inc. and its president, Conviser (hereinafter, "HBJ") in the sale of comprehensive Bar

review courses in Georgia, relevant to the Georgia Bar examination, 874 F.2d 1428, 1429 (text accompanying fn. 5). During that time, the two competitors engaged in "vitriolic" comparative marketing and price competition, also exchanging threatening correspondence. In early 1980, the list price for each course was approximately $150, id., at 1429.

HBJ sells bar review courses for the respective bar examinations in more than 40 states under the trade name, "Bar/BRI," and is the largest provider in the country, id. at 1429. Its price in Georgia of $150 during 1980 was allegedly below its marginal cost, according to Conviser, id. at 1429. BRG had sold courses solely in Georgia but, in reincorporating with a name change from "Bar Review Group, Inc." to "BRG of

Georgia, Inc.," and in correspondence to HBJ in 1979, implied an intention to expand its markets, R. 2-13 ex. B, pg. 3.

Between 1978 and 1980 the defendants possessed a combined statewide market share of between 80%, according to Pelletier, id., at 1440, and 93%, according to a five-year market survey conducted by an economics expert (Dr. David Kamerschen), id., at 1439 and fn. 37. Since Georgia permits third year law students to take the bar examination while they are full-time students, an opportunity which a majority of the students take advantage of, bar review courses are sold and provided in the three cities in Georgia in which law schools are located -- Atlanta, Athens, and Macon. Almost all student-consumers purchase and attend the course in the city where they

attend law school, in view of transportation time and costs for travel between sub-markets. Id. , at 1440.

In early 1980, while directly competing, Conviser (for HBJ) and Pelletier (for BRG) "got together" for three private meetings to discuss various proposals for eliminating their competitive relationship, id., at 1429 and at fn. 5. They eventually reached an agreement and entered into a combination for that purpose, id., at 1429, later memorializing their combination in 1980 in a written "licensing agreement," id. The written contract constituted direct evidence of the existence and terms of the conspiracy entered into between HBJ and BRG: it contained (i) mutual covenants not to compete; (ii) a national market allocation clause, assigning retail

customers in the state of Georgia to BRG and retail customers in the other 39 states in which HBJ or its "licensees" then were doing business to HBJ; (iii) a clause giving the exclusive right to BRG to purchase and resell in Georgia HBJ's written bar review materials; (iv) a clause giving the exclusive right to BRG to use HBJ's "Bar-Bri" tradename in Georgia; and (v) a clause providing for BRG to pay 40% of its net retail price, exceeding $350 per customer, to HBJ, id. at 1429 and fn. 6.

After the conspiracy was initiated, HBJ discontinued selling a bar review course at retail in Georgia, and the price of the BRG course "skyrocketed" from $150 to over $400, id., at 1419, 1429. BRG did not attempt to sell a course in any other state and discontinued use of its own

copyrighted bar preparation material and many of its former lecturers. Law students who purchased the course after the price escalation filed a class action antitrust suit against the defendants in early 1982, id., at 1430. In October, 1982, while that case was pending, defendants privately modified their written licensing agreement by deleting the covenants not to compete, the market allocation clause, and the exclusive licensing clause, id. at 1430; the 1982 written contract modification, however, retained the exclusive trademark provision and the revenue-sharing provision, id.

Notwithstanding the 1982 contract modifications, which were revealed in 1984 when the first lawsuit was settled, the defendants' non-competitive relationship remained unchanged, and HBJ did not resume

retail sales in Georgia or license any other seller of its bar review materials or trademark in Georgia, id. at 1430. In 1985, after the initial lawsuit was settled, the price of BRG's course, sold now under the Bar/Bri tradename without competition from any other comprehensive bar review course, "escalated to approximately $825," id. at 1430; the escalated revenues were shared with HBJ, pursuant to the licensing contract, and there was no significant reduction in sales, id. at 1438, 1440-41. BRG controlled 95% of the market for all bar preparation material in Athens and northeast Georgia in 1985-86, according to another market survey, id., 1440.

The plaintiffs in the instant case filed an antitrust class action against the defendants on November 4, 1985,

seeking to represent consumers in Athens who purchased a course after June, 1984 and who were not included in the settlement of the first case. They alleged a continuing conspiracy between BRG and HBJ, initiated in 1980, to raise price, allocate markets, refuse to deal with independent suppliers (boycott), and monopolize the Athens submarket, Georgia market, and (with respect to HBJ), the national market for comprehensive bar review courses, pursuant to Sections One and Two of the Sherman Act, 15 U.S.C. 1 and 2. They also alleged unilateral monopolization and attempts to monopolize the Georgia retail and wholesale markets by BRG and HBJ, respectively, seeking damages and injunctive relief, pursuant to 15 U.S.C. §§ 13, 26.

The District Court issued Orders in

January and July, 1987 denying class certification and denying plaintiffs' motion for partial summary judgment on liability for per se violations of Section One of the Sherman Act. The Court's two Orders also granted defendants' Motions for Summary Judgment on all counts. App. C and D. On June 7, 1989, the Court of Appeals affirmed the decisions granting summary judgment, with Judge Clark filing a lengthy dissent, App. A. The plaintiffs then filed a petition for rehearing and suggestion of rehearing en banc on June 27, 1989. The U.S. Department of Justice moved for permission to file and then filed, on June 30, 1989, a brief amicus curiae supporting plaintiffs' request for rehearing en banc, App. F. That amicus brief, on behalf of the United States, stated that, "the panel's decision

threatens proper antitrust enforcement by wrongly limiting the doctrine of per se illegality as applied to market allocation agreements," amicus brief, pg. 1.

On January 26, 1990, seven months later, counsel for plaintiffs submitted to the Court's attention by letter this Court's decision, dated January 22, 1990, in Federal Trade Commission v. Superior Court Trial Lawyers' Association, 110 S.Ct. 768 (1990). On January 29, 1990, the Court issued an Order amending its June 7 Opinion by adding a paragraph and otherwise denying the petition for rehearing and suggestion of en banc rehearing, without mentioning Superior Court Trial Lawyers' Association, supra, App. B. Judge Clark adhered to his dissent. On February 1, 1990, plaintiffs moved, pursuant to Eleventh Circuit Rule

41-1, to stay and/or recall the Court's mandate seeking a poll of the full Court on the suggestion of en banc rehearing. That motion was denied by Order dated February 28, 1990, which also denied plaintiffs' request to cite supplemental authority.

This petition follows within 90 days of the January 29, 1990 Order.

The panel majority's Opinion contains several explicit holdings relevant to the questions presented by this petition. Each of those holdings is subject to an express dissent by Judge Clark. With respect to plaintiffs' claims that defendants had, in 1980, entered into a per se illegal conspiracy to fix prices and allocate markets, evidenced by the subsequent 1980 written contract, and which continued notwithstanding the 1982

modification of the written contract, the majority upheld a finding that defendants' agreement did not constitute price-fixing or market allocation: the conspiracy was "not a classic form of price-fixing where two competitors agreed what price they would charge for their products . . . ," id. at 1424; moreover, the conspiracy did not constitute a situation "where competitors divided up a market in which both were doing business, each taking a portion of the market," id., at 1424. Judge Clark, in dissent, wrote that, "It is clear that a horizontal price-fixing violation does not require that the defendants literally fix prices," id., at 1434. Judge Clark also wrote that, "The Court . . . made an erroneous legal distinction between the terms 'divide' and 'allocate.' Well-established case law

demonstrates that the allocation of markets or sub-markets by competitors is a per se antitrust violation," id., at 1433.

The panel majority also held, in response to plaintiffs' alternative Section One "rule of reason" and Section Two "conspiracy to monopolize" claims, that the "appellants may only prevail by demonstrating that BRG's and HBJ's arrangement had an anticompetitive effect in relevant geographic and product markets," id., at 1424, and that "proof of relevant product and geographic market is absolutely essential to appellants' Section Two claims," id., at 1426, 1427, thereafter concluding that plaintiffs' uncontradicted evidence had not adequately defined the relevant market or sub-market. In dissent, Judge Clark wrote, "Although

the rule of reason will often require a careful balancing of a challenged restraint's harms, benefits, and alternatives, a court can readily condemn a challenged restraint on summary judgment when the restraint directly limits competition on price or output and has no procompetitive justification," id., at 1436. If defendants' agreement were naked, or if plaintiffs proved "actual detrimental effects," then "plaintiffs would not have to define a relevant market or show market power." Judge Clark concluded that plaintiffs' evidence met both tests for proving unreasonableness. Id., at 1437.

The panel majority furthermore held that "antitrust law limits the range of permissible inferences from ambiguous evidence in a Sherman Act Section One

case. Conduct as consistent with permissible competition as well as illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy [citations omitted]. To survive [defendants'] motion for summary judgment, the appellants must present evidence tending to exclude the possibility that BRG and HBJ acted independently," id., at 1422. By contrast, Judge Clark's "disagreement with the majority begins with its adoption of an improper standard of review in this summary judgment action," id., at 1430. "It is therefore doubtful whether the standards announced in Matsushita and Monsanto apply in situations, such as this action, where the direct evidence of concerted action is manifest in explicit written agreements between dominant firms

allocating and monopolizing the market and interfering with independent price setting," id., at 1431.

Finally, in denying the petition for rehearing, the panel majority amended its Opinion by adding a paragraph, responding belatedly to the Justice Department's amicus brief. The majority added, "First, the [1982] agreement is not a 'naked agreement' between competitors to allocate the market. Second, HBJ and BRG are not horizontal competitors. HBJ's affidavit states that it is no longer a competitor in the Georgia market," App. B.

Although Judge Clark did not add anything to his dissent, his original dissent already had responded to the majority's post-hoc analysis. Judge Clark wrote, "HBJ and BRG's assertion that HBJ's 'withdrawal' from the Georgia market

somehow altered BRG's and HBJ's status as actual or potential competitors is disingenuous. Their argument would essentially nullify the per se rule because horizontal competitors could avoid antitrust liability by simply entering into anticompetitive agreements that have vertical aspects. Instead, a Court must view an arrangement's economic substance rather than its form," id., at 1433. Judge Clark also wrote that, "the record is devoid of any evidence that the agreement between HBJ and BRG was ancillary or that it had some procompetitive, efficiency-creating potential," id., at 1435. The "1980 BRG-HBJ agreement is a blatant 'naked' restriction on output" . . . "plaintiffs must prevail because they have demonstrated actual detrimental effects,"

id., at 1437.

Perhaps the most serious disagreement between the majority and dissenting opinions, and the one least understandable to a putative plaintiff class of lawyers and law students, is the disparity in the descriptions of the contents of the record.

The majority held that, "As evidence of anti-competitive effect, the appellants offered the [1980] contract itself, the fact that the price went up after the parties signed the contract, and the affidavit of Leon van Gelderen . . . the appellants relied on an affidavit of Dr. William Henry, filed February 9, 1987, to address the issues of relevant product and relevant geographic market," id., at 1425. "The District Court also found that the entirety of the appellants' effort to

identify proper product and geographic markets was contained in the affidavit of Dr. William Henry," id., at 1427.

By contrast, Judge Clark recognized that defendants' list price not only increased from $150 to over $400 after the 1980 conspiracy was initiated, it continued to increase to $825 in 1985, id. at 1437. Moreover, the 1980 and 1982 agreements did specifically address the factor of price by including a $350 per course floor before revenue-sharing began, at a time when the list price was only $150, id. at 1435, 1438. Judge Clark also noted that the conspiracy "totally eliminated price and interbrand competition," id. at 1433, and precluded HBJ or any other potential licensee in Georgia from using the "Bar/Bri" tradename, id., at 1438. The conspiracy

totally eliminated consumer choice, as perceived by the consumers, and reduced output by shelving the previously utilized BRG copyrighted materials, id. at 1438.

Judge Clark wrote that, "the District Court discounted most of the plaintiffs' totally uncontested evidence" of relevant markets and monopoly power, id. at 1439. The majority similarly ignored the evidence. That evidence included a second, much longer affidavit of Dr. Henry, who analyzed information contained in four years of defendants' enrollment contracts and the relevance of transportation costs; the deposition and five-year market survey of Dr. David Kamerschen; the market survey, questionnaire responses, and affidavit of Professor Ponsoldt; the affidavits of three additional consumers and deposition

testimony of the plaintiffs and defendants; and defendants' comparative marketing literature and correspondence, id., at 1439-41. That evidence was uncontradicted. Defendants offered no expert testimony or market information. The majority provided no explanation for why it was ignoring the evidence described and cited in the dissenting Opinion.

REASONS FOR GRANTING THE PETITION

As Judge Clark recognized in dissent below, plaintiffs were entitled to prevail based upon any of several antitrust theories: the per se rule applied to price-fixing, the per se rule applied to market allocation, the Rule of Reason applied to naked restraints and/or where there are actual detrimental effects upon price or output, the rule of reason under

a traditional intrabrand/interbrand market power balancing test, and Section Two monopolization principles applied to the intentional dominance of relevant markets and submarkets as attested by three uncontested market evaluations and expert affidavits.

The Opinion of the panel majority conflicts with recent decisions of this Court and the Seventh, Fourth, Ninth, and Tenth Circuits, with the views of the Department of Justice, and with the Summary Judgment Rule. The Opinion would create serious enforcement problems and gaping loopholes in antitrust policy and would tolerate "disingenuous" evasions of law and continuing consumer injury: "the two principal competitors in the Georgia market have accomplished through their written agreement and subsequent actions

what the antitrust laws were designed to prevent: injury to the consumer," 874 F.2d at 1435, Clark, J., dissenting. That injury continues today, unabated, affecting current and future law students. Since the lower court affirmed summary judgment without addressing the adequacy of most of the record evidence those student-consumers perceive that the propriety of the lawsuit has never been resolved.[1]

I. THE PANEL MAJORITY'S UNDULY NARROW CONCEPTIONS OF "PRICE-FIXING" AND

[1] Judge Clark, in his dissent, also disagreed with the denial of class certification. In the event of remand to the District Court, Judge Clark is correct in believing the District court likely would reconsider the class certification issue. Otherwise, the complaint could be amended to add plaintiffs.

"MARKET ALLOCATION" SUBJECT TO PER SE CONDEMNATION ARE CONTRARY TO DECISIONS OF THIS COURT AND THE FOURTH CIRCUIT AND WOULD EVISCERATE PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT, AS THE JUSTICE DEPARTMENT'S AMICUS BRIEF BELOW ARGUED.

The majority Opinion affirmed that an agreement between competitors to raise price is not per se illegal price-fixing unless it is "classic," "where two competitors agreed what price they would charge for their products," and prices are literally "fixed," 874 F.2d at 1424. That holding is contradicted by Superior Court Trial Lawyers' Association, supra, 110 S.Ct. 768, at 774, 775 (and cases cited therein): "Prior to the boycott, CJA lawyers were in competition with one another, each deciding independently whether and how often to offer to provide services . . . The agreement among the CJA lawyers was designed to obtain higher

prices for their services and was implemented by a concerted refusal to serve an important customer . . . 'This constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price . . .' the horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output. [citation omitted]."

In the present case, HBJ and BRG agreed that HBJ would withhold its product from Georgia customers so that BRG could increase its price 300% overnight and share the increased price with HBJ. BRG further agreed not to initiate price competition against HBJ in any of the other 39 states in which HBJ did business so that HBJ could maintain its price level in those other states. In failing to

apply the "per se" rule to the defendants' conduct in the present case, but instead requiring proof of defendants' market power in a specifically defined market, the panel majority has transformed the per se rule into a rule of "'administrative convenience and efficiency,' not a statutory command," as this Court condemned in Superior Court Trial Lawyers, 110 S.Ct. at 780.

Even in the absence of the agreements not to compete and to share increased prices above $350 per customer in this case, and the resulting actual price escalation, defendants' concerted action would have been subject to the per se rule as horizontal market and customer allocation: "one of the classic examples of a per se violation of Section One is an agreement between competitors at the

same level of the market structure to allocate territories in order to minimize competition," United States v. Topco Associates, Inc., 405 U.S. 596, at 608 (1972). The panel majority restricted the per se rule, however, to agreements to "divide" pre-existing markets, 874 F.2d at 1424, which Judge Clark in dissent recognized to be incorrect, id., at 1433-34. Topco did not involve any agreement to increase and share price, nor did it involve a market "division." Rather, Topco involved purely an allocation of markets among potential competitors.

As Justice Scalia has written recently, "It may well be possible to envision some divisions of territory between competitors that do not, in the peculiar circumstances, reduce competition . . but such phenomena would be so rare that the

benefit of a rule prohobiting divisions of territory far exceeds the harm caused by overshooting sightly the precise congressional goal .... Such reduction of vague congressional commands into rules that are less than perfect fit is not a frustration of legislative intent because that is what courts have traditionally done and hence what Congress anticipates when is legislates,..." Scalia, "The Rule of Law As A Law of Rules," 56 U. Chi. L. Rev., 1175, 1183 (1989).

This Court should readily understand why the Justice Department was concerned with the Court's ruling: it would bar much criminal antitrust enforcement against bid-rigging and customer allocation, unless the defendants were proven to have market power in specific markets. In paradigm bid-rigging and

customer allocation cases, there is no agreement among existing competitors to rig bids for or "divide" existing customers, nor is there a literal agreement on price or proof of defendants' market power. See, e.g., United States v. Dynalectric Co., 859 F.2d 1559 (11th Cir. 1988) (affirming criminal conviction where contractors agreed not to compete for new customers but instead to enter into a "contractor-subcontractor" relationship and share profits).

The Justice Department, "primarily responsible for enforcing the federal antitrust laws and thus interested in the sound development of antitrust doctrine" (amicus brief, pg. 1), advised the en banc Court of Appeals, in support of en banc rehearing (which by local Rule is reserved for extraordinary cases): "Whatever the

merits of this antitrust case, concerning which the United States takes no position, the panel's limitation of the per se prohibition on market allocation by horizontal competitors to circumstances in which parties to the agreement divide between themselves a market in which both were doing and continue to do business is wrong as a matter of law, economics, and policy," amicus brief, pp. 2-3 (emphasis added).

The traditional application of the per se rule is as stated by the Fourth Circuit: "Any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party . . . [is] per se violative of 15 U.S.C.," United States v. Portsmouth Paving Corp., 694 F.2d 312, 329 (4th Cir. 1982). See, most recently,

United States v. Suntar Roofing, Inc., _ F.2d ___, 1990-1 CCH Trade Cases ¶68,936 (10th Cir. 1990) (an agreement between potential competitors to allocate customers is per se unlawful.)

In the present case the defendants, while competing directly, agreed that HBJ would withhold contract offers from Georgia customers and BRG would withhold contract offers from non-Georgia customers. The test for the per se rule applied in the present case conflicts directly with the paradigm test as applied by the Fourth and Tenth Circuits (and this Court) and would undermine antitrust enforcement, reducing the per se rule to a rule of "convenience" rather than a "statutory command," if allowed to stand by this Court.

In summary, by holding that price

fixing is per se illegal only when horizontal competitors fix a specific price, and by holding that market allocation is per se illegal only when horizontal competitors "divide," rather than "allocate" markets, the Eleventh Circuit is in direct conflict with long-standing antitrust principles stated in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811 (1940), and Topco, supra., and recently affirmed in Superior Court Trial Lawyers. The effect, as is clear from the Justice Department's amicus brief, will be to undermine civil and criminal antitrust enforcement.[2]

[2] On rehearing, the panel majority did not delete any of its initial Opinion, 893 F.2d 293, App. B. Instead, the majority added two brief characterizations to the record which, upon reflection, are remarkably "disingenuous" and "meritless," 874 F.2d at 1432, as Judge Clark previously had written in dissent. The Court wrote that:

the modified 1982 written contract, entered into secretly, two years into the ongoing conspiracy after the defendants had been sued, was "not a 'naked agreement' between competitors to allocate the market"; and, "HBJ and BRG are not horizontal competitors," because the terms of their continuing conspiracy required HBJ to withdraw from Georgia and have precluded competition, 893 F.2d 293.

Such an addendum contains a breathtaking invitation and blueprint for future antitrust violators.

As Judge Clark recognized, "their argument would essentially nullify the per se rule because horizontal competitors could avoid antitrust liability by simply entering into anticompetitive agreements that have vertical aspects. Instead, a Court must view an arrangement's economic substance rather than its form," 874 F.2d 1433. Such a substantive basis for distinguishing "horizontal" from "vertical" restraints has been recognized by this Court at least since United States v. Sealy, Inc., 388 U.S. 350 (1967), and United States v. Topco Associates, Inc., 405 U.S. 596 (1972). In Sealy and Topco the plaintiff did not challenge the formation of the parent entity or its general licensing arrangements with its shareholders but instead challenged the market allocation terms of the initial and ongoing combination. In focusing only upon the "modified 1982 contract" in this case, therefore, the majority has addressed an issue that plaintiffs never raised and thereby condoned a transparent

II. THE PANEL MAJORITY'S REQUIREMENT THAT AN ANTITRUST PLAINTIFF NECESSARILY SUBMIT STRUCTURAL EVIDENCE TO PROVE SPECIFIC MARKET DEFINITIONS CONFLICTS WITH RECENT DECISIONS OF THIS COURT AND THE SEVENTH, NINTH, AND TENTH CIRCUITS.

Despite this Court's decisions in N.C.A.A. v. Board of Regents, 468 U.S. 85 (1984), and F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447 (1986), confusion apparently still exists in the lower courts concerning whether an antitrust plaintiff under the "Rule of Reason" necessarily must prove that the defendants control a dominant share of a

evasion of the antitrust laws.

Judge Clark correctly observed, however, that "the record is devoid of any evidence [or claim, or finding] that the agreement between HBJ and BRG was ancillary or that it had some procompetitive, efficiency-creating potential," 874 F.2d at 1435.

specifically-defined market. In N.C.A.A. this Court rejected N.C.A.A.'s claim that because television rights to intercollegiate football games was not specifically proven to be a relevant product market, N.C.A.A.'s restraint could not be deemed unreasonable. In Indiana Federation, this Court rejected the dentists' claim that because the F.T.C. had not adequately defined a relevant geographic market, the dentists' agreement not to provide X-rays to insurance companies could not be deemed unreasonable.

In the present case, the panel majority affirmed a holding that "appellants may only prevail by demonstrating that BRG's and HBJ's arrangement had an anticompetitive effect in relevant geographic and product markets," 874 F.2d

at 1424. The only basis stated by the majority for granting summary judgment with respect to plaintiffs' rule of reason claim, in fact, was the alleged lack of proof of relevant markets, id., at 1425, 1426, 1427.[3]

Although, as Judge Clark recognized in dissent, plaintiffs did, in fact, prove relevant markets and defendants' overwhelming market share through three categories of empirical evidence supported by three independent expert opinions, plaintiffs also proved unreasonableness

[3] In its caption on pg. 1426, labelled, "C. Sherman Act § 2 Analysis," the majority actually has confused "Rule of Reason" analysis with Section Two analysis. The Rule of Reason, of course, is relevant to Section One, not Section Two. The confusion in the Opinion is very telling: the panel literally transformed Section One into Section Two monopolization theory, and then disregarded plaintiffs' structural evidence.

by evidence of a 500% increase in defendants' list price, a reduction in output by the shelving of BRG's copyrighted material, and the total elimination of consumer choice and interbrand competition, as perceived by three sets of consumers. As Judge Clark recognized, consistant with this Court's opinions in N.C.A.A., and Indiana Federation, an agreement is unreasonable when it "directly limits competition on price or output and has no procompetitive justifications," or when it creates "actual detrimental effects," 874 F.2d at 1436, 37. The agreement in this case satisfied both tests, id.

The Seventh Circuit has just issued a decision interpreting the Rule of Reason which conflicts with the opinion below. The Seventh Circuit, relying upon and

quoting from Indiana Federation, has recognized that evidence of actual adverse effects on competition caused by a boycott was sufficient, even without specific proof of market definition, to establish the defendants' market power and the unreasonableness of defendants' conduct. Moreover, a showing of specific anticompetitive effects eliminated the need for any more specific inquiry into market definition, Wilk v. A.M.A., 895 F.2d 352 (Feb. 7, 1990): "The district court also relied on substantial evidence of adverse effects on competition caused by the boycott to establish the AMA's market power.... These findings eliminated the need for an inquiry into market power," 895 F.2d at 360. The holding in Wilk, which also upheld the District Court's market definition finding

based upon far less evidence than in the present case, cannot be reconciled with the majority opinion in this case.

The Ninth Circuit, in E.W. French & Sons, Inc. V. General Portland, Inc., 885 F.2d 1392 (1989), has held similarly that requiring an antitrust plaintiff to define the relevant market is too expensive and time-consuming when the evidence demonstrated the existence of concerted action whose purpose was to restrain price or output. See generally, 885 F.2d at 1404, 05 (Farris, J., concurring): "The crucial point is that neither market definition nor the traditional methods of market definition are essential to proving anticompetitive effect," id., at 1405.

The panel's separate holding in the instant case that defendants' market power in specifically defined markets must be

proven in connection with plaintiffs' conspiracy to monopolize claim is contradicted by a recent decision of the Tenth Circuit. In Monument Builders v. American Cemetery Association, 891 F.2d 1473 (10th Cir. 1989), the Court reversed the dismissal of a conspiracy to monopolize claim, holding specifically that, "'conspiring to monopolize is a separate offense under Section Two, requiring less in the way of proof than the other Section Two offenses [citation omitted] . . . . Market power in a relevant market need not be proved,'" 891 F.2d at 1484.

By contrast in the instant case, the panel affirmed the dismissal of plaintiffs' conspiracy to monopolize claim on the ground that, "proof of the relevant geographic and product market is essential

to all Section Two claims" . . . "the appellants' failure to properly identify relevant product and geographic markets required the District Court to grant summary judgment . . . on Counts V [conspiracy to monopolize] through VII," 874 F.2d at 1427, 1428. Judge Clark's dissent, id. at p. 1430, and fn. 32, recognizes that alleged lack of proof of market definition was the basis for the Court's decision, and that such a holding conflicts with recognized authority.

The decisions of the Seventh and Ninth Circuits limiting the plaintiff's burden in horizontal Rule of Reason cases, and the clear conflict between the Tenth and Eleventh Circuits regarding the necessary elements of a Section Two conspiracy case warrant the grant of certiorari to resolve the conflicts. The question of whether

or not an antitrust plaintiff must seek and introduce, and trial courts must demand, costly expert structural evidence in these categories of cases obviously is recurring and warrants attention.

III. THE UNEXPLAINED DISPARITY BETWEEN THE MAJORITY AND DISSENTING OPINIONS BELOW DESCRIBING THE CONTENTS OF THE SUMMARY JUDGMENT RECORD AND LEGAL STANDARD FOR SUMMARY JUDGMENT INDICATES THAT THE MAJORITY HAS DEPARTED FROM ACCEPTED JUDICIAL STANDARDS, WARRANTING THIS COURT'S SUPERVISION.

Rule 10.1(a) of the Rules of this Court provides, as a consideration for granting certiorari, that certiorari may be appropriate when a Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision." This is

such a case, for two reasons.

First of all, the panel below affirmed a summary judgment standard which is inapplicable to this case and in conflict with the Seventh Amendment, 874 F.2d at 1430. In his dissent, Judge Clark acknowledged this error. The majority held that "antitrust law limits the range of permissible inferences" which a plaintiff can rely upon to defeat summary judgment. Relying on Matsushita, the panel majority announced: "to survive a Motion for Summary Judgment, the appellants must present evidence tending to exclude the possibility" of innocent conduct, 874 F.2d at 1422. However, this Court's actual holding in Matsushita, 475 U.S. at 587, is quite different and much more specific. This Court in Matsushita held that an antitrust party has a more

stringent burden only when "the factual context renders [the non-moving parties'] claim implausible"; see also id., at 593. "Implausibility" according to Matsushita referred to the economic reasonableness of plaintiffs' claim and therefore the "genuineness" of the factual dispute -- that 20 competitors agreed to sustain losses from predatory pricing over a generation with the goal of eventually recouping those losses. By contrast, in this case, the "factual context" rendered plaintiffs' price-fixing and monopolization claims highly plausible. Evidence of a 500% price increase, in contrast to low prices over a long period of years in Matsushita, and two written contracts confirmed the plausibility of the claims. Moreover, there was no basis to "limit the range of permissible

inferences" to be drawn from plaintiffs' market definition evidence, which was uncontradicted.

Extending the Matsushita burden to antitrust plaintiffs in all antitrust cases, simply denies them a right to have a jury choose between conflicting possibilities or hypotheses -- one of innocence and one of guilt -- particularly when defendants have introduced no conflicting evidence other than general denials. In criminal cases, where the standard of proof is supposedly higher than in civil cases, "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt . . . ," United States v. Bell, 678 F.2d 547, 549 5th Cir. en banc, aff'd on other grounds, 462 U.S. 356

(1983).

The summary judgment standard applied by the panel thus imposes upon all antitrust civil action plaintiffs a greater burden to reach a jury than upon the government in criminal conspiracy cases to obtain a conviction. That result departs from the accepted course of judicial proceedings, founded upon the Seventh Amendment, that plaintiffs have a right to a jury trial to resolve disputed material facts or inferences.

The second reason that this Court's supervisory authority is warranted in this case concerns the huge disparity between the majority and dissenting opinions regarding the actual content of the summary judgment record, which may indicate an institutional failure of Eleventh Circuit practice. On review of

an Order granting summary judgment, a court of appeals must determine, de novo, whether the trial court was correct in concluding that the non-movant's evidence was insufficient to create a genuine dispute regarding material facts. In this case, the trial court held that plaintiffs' evidence of anticompetitive effects, continuing conspiracy, and market definition and power was insufficient to create any genuine factual dispute. However, as Judge Clark observed, "the District Court discounted [i.e. disregarded] most of the plaintiffs' totally uncontested evidence," 874 F.2d at 1439. An examination of the majority opinion reveals its recitation of the allegations in the appellate briefs and the opinions of the District Court, but no independent analysis of the

contents of the record or of governing law. The majority thus did not inquire whether the District Court's opinion accurately described the record or the law. By local Eleventh Circuit Rule, appeals are submitted without an appendix, based upon the original record, which is maintained in the Clerk's Office in Atlanta, Georgia, plus a very limited "Record Excerpts," Eleventh Circuit Rule 30-1.[4] The two Judges in the majority below are not located in Atlanta, whereas the dissenting Judge is located in Atlanta. The opinion of the dissenting Judge accurately describes the contents

[4] On petition for rehearing, plaintiffs requested permission to submit and then submitted a limited appendix to the panel. The panel's subsequent decision denying rehearing (App. B) did not refer to any of the evidence contained in the appendix.

of the record, at least in summary.

The evidence cited by the dissenting judge was in the record. That evidence includes three independent empirical studies of defendants' market share and market power, accompanied by three separate expert opinions, and defendants' own marketing literature and correspondence. As defendant BRG's price increased over 500% between 1980 and 1985, its sales and market share remained constant. The majority opinion disregards all of that uncontradicted evidence. The only explanation for such a deviation from the "accepted and usual course of judicial proceedings" is that the two judges in the majority never examined the original record in Atlanta. Thus, the disposition of this case below may reflect an ongoing institutional problem in the Eleventh

Circuit, particularly in summary judgment appeals, caused by that Court's preclusion of the submission of appendices on appeal, governed by Rule 30, F.R.App.P.

The dissenting opinion serves as a message to the putative class of plaintiffs -- Georgia law students, for whom the opinion below will serve as a teaching material -- that being correct on both the law and the facts is not always enough to prevail in Federal Court. This Court should exercise its supervisory authority to prevent the confirmation of such a message: "The trouble with the discretion-conferring approach to judicial law-making is that it does not satisfy this sense of justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected,

not only that the later case <u>be</u> different, but that it <u>be seen to be so</u>." (emphasis in original), Scalia, supra, 56 <u>U. Chi. L. Rev.</u> at 1178.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari to review the judgment of the Court of Appeals, as amended.

Respectfully submitted,

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APPENDICES

[APPENDIX A]

Jay PALMER, et al.,
Plaintiffs-Appellants,
v.
BRG OF GEORGIA, INC., a Georgia
Corporation, d/b/a BAR/BRI, et al.,
Defendant-Appellees.

No. 87-8804.

United States Court of Appeals,
Eleventh Circuit.
June 7, 1989.

John C. Butters, Atlanta, Ga. and James Ponsoldt, Athens, Ga., for plaintiffs-appellants.

Trammell Newton, Hansell & Post and Kevin E. Grady, Alston & Bird, Atlanta, Ga., for defendants-appellees.

Appeal from the United States District Court For the Northern District of Georgia.

Before HATCHETT and CLARK, Circuit Judges, and FITZPATRICK *, District Judge. (* Honorable Duross

Fitzpatrick. U.S. District Judge for the Middle District of Georgia, sitting by designation.)

HATCHETT, Circuit Judge:

In this action brought by former law students of the University of Georgia Law School against bar review companies, we affirm the district court's ruling that the bar review companies did not violate the Sherman Act.

FACTS

Appellants, all 1985 graduates of the University of Georgia Law School in Athens, Georgia, brought this antitrust action against BRG of Georgia, Inc. (BRG), a Georgia corporation, Ronald O. Pelletier, BRG's owner, and Harcourt Brace Jovanovich legal and Professional Publications, Inc. (HBJ), a Delaware

corporation.[1] The appellants took a bar review course offered by BRG during January and February of 1985 in preparation for the Georgia bar examination.

In 1979, BRG offered a bar review course which covered the federal multistate and Georgia law components of the Georgia bar exam. The BRG course included written materials plus lawyers and professors' live and videotaped lectures.

In 1979, BRG used West Publishing Company's (West) free standardized

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[1]. BRG includes Bar Review Group. Inc. and BRG publications, Inc., all Georgia corporations. Pelletier formed BRG in 1979 for the sole purpose of offering bar review courses to Georgia bar applicants.

multi-state materials which were being test marketed. BRG offered its bar review course at a lower price than it would have charged otherwise due to the availability of the free multi-state materials.

In 1973, HBJ began offering a review course for the Georgia bar exam and has offered bar review courses arid materials nationwide under the trade name "Bar/Bri." The record does not contain a precise description of HBJ's Georgia course, but the parties state that it is similar to the format of the BRG course. HBJ developed its own standardized multi-state materials and sold these as a part of its Georgia course.

In 1979, BRG and HBJ competed in Georgia. In response to the low price of BRG's course, HBJ reduced the price of

its Georgia course and lost money as a result. Richard Conviser, chairman of HBJ's board of directors, states in his affidavit that HBJ lost $45,000 on revenues of $120,000 without accounting for overhead.

At some point in 1979, West informed BRG that it planned to sell its multi-state materials through book stores, thus ending the test market arrangement. At about the same time, the lawyer who had been in charge of conducting HBJ's Georgia course suffered a heart attack. Conviser's affidavit states that HBJ decided to withdraw from the Georgia market at this time, but no documentation of this decision has been offered.

Conviser met with Pelletier in early 1980. On April 22, 1980, BRG and HBJ

entered into a written agreement which gave BRG an exclusive license to use HBJ's name "Bar/Bri" in Georgia. HBJ agreed that it would no longer offer a bar review course in Georgia and that it would not compete with BRG in Georgia. BRG agreed not to compete with HBJ outside of Georgia.

Immediately after execution of the 1980 agreement, the price of BRG's course rose from $150 to over $400. The record does not disclose what prices HBJ or other companies were charging for similar bar review courses. In February, 1982, a group of Georgia law students brought a class action lawsuit against BRG and HBJ alleging identical antitrust violations as are alleged in this case. See Edwards, et al. v. BRG of Georgia, Inc., et at., Middle District of Georgia, Circuit A,

No. 82-13th. The class included those students taking BRG's course between April 22, 1980 and June 15, 1981. By offering partial refunds to the class members, BRG and HBJ settled that class.

During the pendency of the 1982 class action, BRG and HBJ executed a modified agreement. In this modified agreement, HBJ withdrew BRG's exclusive right to market HBJ's multi-state materials in Georgia. However, BRG retained the exclusive right to use "Bar/Bri" in connection with its course. Also, the modified agreement dropped the express covenant not to compete which had been contained in the initial agreement. Since the execution of the 1982 agreement, HBJ has not competed with BRG in Georgia nor licensed its multi-state materials for use by any other Georgia

bar review course.

In 1979, the majority of University ot Georgia law students who used a bar review course conducted in Athens, Georgia, took either the HBJ or the BRG courses. The record contains no similar data for subsequent years. The BRG course is currently marketed statewide, and is conducted at various locations in Georgia, including Athens and Atlanta. Other bar review courses are offered to Georgia bar applicants, namely, the "NORD" and "PMBR"
-courses, but these are not described in the record.

PROCEDURAL HISTORY

The appellants sought to represent a class consisting of those law students who attended a BRG course in Athens,

Georgia, between June 15, 1984, and the present.
ing identical antitrust violations as are al- Counts I through IV each alleges section 1
violations of the Sherman Act, 15 U.S.C.A. § 1.[2] A different theory of per se liability was advanced under each of these counts, namely, price-fixing cartel (Count I); market and customer allocation (Count II); boycott and concerted refusal to deal (Count III); and unreasonable joint venture (Count

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[2]. Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ..."

IV).[3] Counts V through IX of the complaint each alleged section 2 violations of the Sherman Act, 15 U.S.C.A. § 2.[4] The allegations were: conspiracy to monopolize in Georgia (Count V); attempt to monopolize in Georgia (Count VI); monopoly in Georgia

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[3]. The district court noted that these theories were improperly pled as separate counts because the plaintiffs only have one cause of action for an alleged section 1 violation of the Sherman Act. However, for ease of reference, the district court referred to the designations chosen by plaintiffs.

[4]. Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolized or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed [to have violated this Act]

(Count VII); conspiracy. to monopolize nationwide (Count VIII); and attempt to monopolize nationwide (Count IX).

BRG and HBJ answered denying liability and denying that the class described by the appellants could be properly certified. On February 7, 1986, appellants moved for class certification and later moved for partial summary judgment on one of the conspiracy counts of their complaint. On May 2, 1986, BRG and HBJ moved for summary judgment. Appellants subsequently filed a motion for Fed.R.Civ.P. 11 sanctions against Pelletier.

On January 9, 1987, the district court denied appellants' motion for summary judgment, but granted BRG's and HBJ's motion for summary judgment as to Counts II through IX of the complaint,

and deferred ruling on Count I. The district court found that BRG Publications Inc.
and Bar Review Group, Inc. were related corporations which have been defunct at relevant times and had no involvement in any allegedly anti-competitive activities. The district court granted summary judgment to BRG Publications, Inc. and Bar Review Group. on all counts. In separate orders, the district court also denied appellants' motions for class certification and Rule 11 sanctions.

On February 9, 1987, appellants filed a Motion for Reconsideration of the January 9 rulings, and a memorandum responding to the district court's invitation to produce evidence to support a section 1 "rule of reason violation" of the Sherman Act. The district court

declined to reconsider its previous rulings, held that the appellants had failed to support a rule of reason violation, and granted BRG's and HBJ's motion for summary judgment on Count I. On July 16, 1987, the district court entered judgment. Appellants filed a motion to alter or amend the judgment, and the district court denied that motion. Appellants then filed a timely notice of appeal.

ISSUES

The appellants raise five issues on appeal:

1) whether the district court's determination that the appellants "may lack financial commitment" to this consumer class action constitutes a proper legal standard;

2) whether the district court abused

its discretion in denying a motion for sanctions against Pelletier;

3) whether the district court erred in granting BRC and HBJ summary judgment;

4) whether evidence that BAG's and HBJ's combination enabled them to: increase price 800-percent; reduce output; and eliminate consumer choice for a product uniformly perceived to be indispensable, is sufficient proof of anticompetitive effect to preclude summary judgment under section 2 of the Sherman Act; and

5) whether the district court erred in granting BRG and HBJ summary judgment when the appellants produced sufficient probative evidence from which a jury could have reasonably inferred that any relevant product and geographic market

existed; monopoly power existed or was dangerously likely to exist in that claimed market; and that BRG and HBJ took actions to secure or intended to secure such monopoly power as required for appellants to establish a violation of section 2 of the Sherman Antitrust Act.

DISCUSSION

I. Consumer Class Certification

[1] The appellants contend that the district court applied an erroneous legal standard in applying Fed.R.Civ.P. 23(a)(4) and misread the record in denying their motion for class certification. Citing Kirkpatrick et al v. Bradford et at., 827 F.2d 718 (11th Cir.1987), the appellants argue that consumer class certification should not be denied because of a lack of subjective

interest on the part of the named plaintiffs, unless their participation is so minimal that they virtually have abdicated the conduct of their case to their lawyer.

BRG and HBJ cite Kirkpatrick to argue that the adequacy of class representation under Fed.R.Civ.P. 23(a) is primarily a factual issue best left for the district court's determination. They argue that the trial court's denial of certification should be upheld absent an abuse of discretion. BRG and HBJ further argue that the individual appellants had little knowledge of the class action when deposed, and that the named appellants were unaware of the extent of their obligation to pay expenses. Thus BRG and HBJ assert that the record demonstrates the appellants'

lack of involvement and unwillingness to finance the case.

Whether a lawsuit may proceed as a class action is committed to the sound discretion of the district court, and its determination will not be overturned absent a showing that it has abused its discretion. In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1543-44 (11th Cir. 1987). The general rule provides that the district court's class certification is final unless an abuse of discretion exists, or the court has applied impermissible legal criteria or standards. Lawter v. Alexander, 698 F.2d 439, 441 (11th Cir.1983).

The district court held:

> At this juncture, plaintiffs only state that they are only capable of

> assuming the cost of mailing notice to approximately 280 absent class members.
>
> Rule 23(a), Fed.R.Civ.P. requires that parties seeking to represent a class demonstrate that they will adequately protect the interest of the class. Because plaintiffs may lack financial commitment sufficient for adequate investigation and trial preparation in light of the court's ruling, the court finds that certification of the class would be improper at this juncture. Accordingly, the motion for class certification is hereby denied.

We hold that the district court did not abuse its discretion, nor apply impermissible legal criteria or standards

in denying the appellants' request for class certification. At the point where certification be came important, the district court had granted BRG's and HBJ's motion for summary judgment on all counts except one. The district court allowed the appellants thirty days to establish a rule of reason claim under Count I, because it had rejected their claims on per se liability. The district court properly exercised its discretion in denying the class certification because the court expected the rule of reason development to require a greater degree of financial commitment than the appellants' depositions reflected they possessed. Accordingly, the district court's denial of consumer class certification is affirmed.

II. Fed.R.Civ.P. 11 Sanctions

[2] The appellants established that Pelletier submitted a false affidavit. BRG and HBJ first entered into a licensing agreement in April, 1980. Paragraph 27 of that agreement provided:

Because HBJ is providing its skill, expertise and special methods to Pelletier and BRG, if either Pelletier or BRG desires to conduct a bar review examination course in any state other than Georgia, it shall first offer HBJ the opportunity to license its courses and materials on the same terms and conditions as contained herein. Because HBJ or its licensees already conduct courses in certain states, BRG and Pelletier agree: (1) not to request a license from HBJ for such states; and (2) they will not directly or indirectly own, manage, operate, join, invest, control or

participate in or be connected as an officer, employee, partner, director, independent contractor or otherwise, with any business which is operating or participating in the preparation of candidates in a state in which HBJ or its licensee is then operating a bar examination review course. Those certain states in which HBJ or its licensees are presently operating is attached hereto as Exhibit "A".

Mr. Pelletier's affidavit states in paragraphs 3:

At no time have I ever agreed with Harcourt Brace Jovanovich legal Publications, Inc. ("HBJ Legal"), or Richard Conviser, or any agent or employee of HBJ Legal concerning:

a) the prices BRG would

charge for bar review courses;

b) where BRG would offer courses or not offer courses;

or

c) hiring only lecturers made available by HBJ Legal.

The appellants argued that Pelletier committed perjury in paragraph 3(b) of his affidavit and thereby violated Fed.R.Civ.P. 11[5] warranting sanctions.

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[5]. Fed.R.Civ.P. 11 provides, in pertinent part: If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the Person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The district court found that the alleged inconsistency between the two statements did not establish perjury, and denied the motion for sanctions.

The appellants contend that Rule 11 sanctions are mandatory, not discretionary. BRG and HBJ contend that the district court properly denied the appellants' motion for sanctions and correctly ruled that no evidence in the record established that Pelletier had committed perjury. BRG and HBJ further argue that the district court did not abuse its discretion in denying the appellants' Rule 11 motion for sanctions.

Although the district court found that Pelletier submitted a false affidavit, the district court did not impose Rule 11 sanctions because it could not determine whether Pelletier was

guilty of perjury, that is, whether his untrue statements were intentional. In reviewing the record, we find that the district court did not abuse its discretion in denying the appellants' motion for Rule 11 sanctions. See Donaldson v. Clark, 819 F.2d 1551 (11th Cir.1987). Accordingly, we affirm the district court's denial of Rule 11 sanctions.

III. Summary Judgment on Antitrust Claims

A. Standard of Review

Appellate review of the granting of a motion for summary judgment questions whether any genuine issue of material fact exists. Fed.R.Civ.P. 56(c). When reviewing a summary judgment decision, the reviewing court is bound by the same legal standards as those that control the district court in determining whether

summary judgment is appropriate. Amey Inc. v. Gulf Abstract & Title Inc., 758 F.2d 1486, 1502 (11th Cir.1985), cert. denied 475 U.S. 1107, 106 S.Ct. 1513, 80 L.Ed.2d 912 (1986).

To survive BRG's and HBJ's motion for summary judgment, the appellants must establish a genuine issue of material fact as to whether BRG and HBJ entered into an illegal conspiracy that caused the appellants to suffer a cognizable injury. Fed.R. Civ.P. 56(e). This showing has two components: first, the appellants must show more than a conspiracy in violation of the antitrust laws existed; they must show an injury to them resulting from the illegal conduct; second, the issue of fact must be genuine. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574,

585-86, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986); Fed.R.Civ.P. 56(c), (e).

When BRG and HBJ carry their burden under Fed.R.Civ.P. 56(c), the appellants must do more than simply show some metaphysical doubt as to the material facts. The appellants must come forward with specific facts demonstrating a genuine issue for trial. Rule 56(e). Where the record, taken as a whole, does not lead a rational trier of fact to find for the appellants, no genuine issue for trial exists. Matsushita, 475 U.S. at 586-87, 106 S.Ct. at 1356; Dunnivant v. Bi-State Auto Parts 851 F.2d 1575, 1579-80 (11th Cir. 1988).

[3] In reviewing a grant of summary judgment, the inferences to be drawn from the underlying facts must be viewed in

the light most favorable to the non-moving party. But antitrust law limits the range of permissible inferences from ambiguous evidence in a Sherman Act section 1 case. Conduct as consistent with permissible competition as well as illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Matsushita, 475 U.S. at 587-88, 106 S.Ct. at 1356-57; Dunnivant, 851 F.2d at 1579-80.

To survive BRG's and HBJ's motion for summary judgment, the appellants must present evidence tending to exclude the possibility that BRG and HBJ acted independently. The appellants must demonstrate that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not

have harmed them. Matsushita, 475 U.S. at 588, 106 S.Ct. at 1357; Dunnivant, 851 F.2d at 1579-80.

In evaluating the appellants' per se liability claims under section 1 of the Sherman Act, the district court found that generally, a plaintiff asserting a section 1 claim must prove that the defendant's acts or conduct had an anti-competitive effect in relevant geographic and product markets. See Standard Oil Co. v. United States, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949). Thus, the appellants bore the burden of proof and were required to make a factual showing in support of these elements when BRG and HBJ moved for summary judgment, See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The district court observed that

where a defendant's complained of acts and conduct fit certain judicially recognized categories, the plaintiffs need not establish that the defendants' conduct actually had an anti-competitive effect, nor establish the relevant product or geographic markets. Thus, the defendant is per se liable for any damages suffered by the plaintiff. The rationale is that the designated conduct is so inherently and reliably anti-competitive that its anti-competitive effects may be presumed.

B. Sherman Act § 1 Analysis

1. Per Se Violation

[4] Certain categories of concerted action which violate section 1 of the Sherman Act have been held to be per se illegal. Per se rules are appropriate only for conduct that is manifestly anti-

competitive, that is, conduct that would almost always tend to restrict competition and decrease output. See Business Electronics Corporation v. Sharp Electronics Corp.,
U.S. 108 S.Ct. 1515, 1519, 99 L.Ed.2d 808 cert. denied - U.S. 108 5. Ct. 1727, 100 L.Ed.2d 192 (1988). See also FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458-59, 106 S.Ct. 2009, 2017- 18, 90 L.Ed.2d 445 (1986) (the Court has "been slow to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."); NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85, 103- 04, 104 S.Ct. 2948, 2961, 82 L.Ed.2d 70 (1984) ("Per se rules are invoked when surrounding circumstances

make the likelihood of anti-competitive conduct so great as to render unjustified further examination of the challenged conduct."); and National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978) (agreements are per se illegal only if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality").

The appellants contend that the district court erred in denying their motion for partial summary judgment based upon theories of per se liability under section 1 of the Sherman Act. The appellants argue that the existence of an agreement between HBJ and BRG providing for the withdrawal of HBJ from an

existing market and its refusal to bid for customers in that market (Georgia), in exchange for the agreement that BRG not sell in other markets or bid for customers in other markets, constitutes per se illegal market allocation and bid rigging. The appellants argue that the district court erroneously held this agreement not to constitute a per se illegal market or customer allocation agreement. The appellants further argue that an agreement between competitors to eliminate price competition and preclude future competition through the exchange of mutual covenants not to compete, coupled with a provision to share profits, constitutes per se illegal price fixing.

The appellants further argue that the district court's holding that BRG's

and HBJ's conduct does not constitute per se illegal price fixing because neither BRG nor HBJ agreed upon the price each would continue to charge for its product is erroneous. According to appellants, BRG's and HBJ's conduct is precisely the kind of combination to which the per se rule is intended to apply.

BRG and HBJ contend that the district court properly granted summary judgment because of the appellants' failure to present significant probative evidence indicating a violation of the antitrust laws. BRG and HBJ assert that they were in a vertical supplier-retailer relationship at the time of the first license agreement; had executed a second agreement; and have submitted affidavits that they were free to compete with each other.

The appellants seek to denominate the agreements and dealings between BRG and HBJ as arrangements of the type to which per se liability has been recognized, namely, price fixing, United States v. Socony-Vacuum Co., 310 Us 150, 60 S.Ct 811, 84 L.Ed. 1129 (1940); market and customer allocation, United States v. Topco Associates, Inc., 405 U.S. 596, 92 S.Ct 1126, 31 L.Ed.2d 515 (1972); boycott and concerted refusal to deal, Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 61 5. Ct. 703, 85 L.Ed. 949 (1941); and unreasonable joint venture, Citizens Publishing Co. v United States 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969).

[5] The district court found that the arrangement between BRG and HBJ did

not fit within any recognized category of per se liability. The district court further found that the 1982 agreement was not a classic form of price fixing where two competitors agreed what price they would charge for their products. On the contrary, the district court found that neither the 1980 nor the 1982 agreement explicitly addressed the factor of price, and that HBJ has never had any right under either agreement to be consulted about the price of the BRG course.] See Socony- Vacuum Oil Co. 310 U.S. 0, 60 S.Ct. 811. The district court also found that although the agreement of two competitors to "pool" their products may exert an upward influence of price, such an agreement is not inherently anti-competitive.

The district court found that

neither agreement between BRG and HBJ constituted the kind of market or customer allocation agreement which has been recognized as a basis for per se liability. See Topco 405 U.S. 596, 92 5.ct, 1126, The

district court found that this was not a situation where competitors divided up a market in which both were doing business, each taking a portion of the market. The district court also found that BRG had never done business outside the state of Georgia, that nothing in the record suggested that it ever intended to do so, and that HBJ has done business nationwide, but withdrew from the Georgia market following the 1980 agreement between BRG and HBJ. Thus, the district court found the only market ever claimed by both defendants was the state of

Georgia, which was not divided up under either the 1980 or 1982 agreements.

The district court ruled that BRG's and HBJ's conduct did not constitute a boycott or concerted refusal to deal. See Zenith Radio Corp v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). The district court rejected the appellants' attempt to invoke the per se theory based on the fact that the agreement prohibited BRG from hiring certain law lecturers because the appellant had no standing to raise that argument.

Finally, the district court found that the conduct described in the record differed from that recognized in Citizens Publishing Co., 394 U.S. 131, 89 S.Ct. 927 as an unreasonable joint venture which was per se illegal. The district

court found that BRG and HBJ did not pool capital, and HBJ had no risk of loss on the Georgia bar review course. Thus, the arrangement created was not a joint venture, and the Citizens Publishing theory is inapplicable.

The district court denied the appellant motion for partial summary judgment and granted summary judgment to the defendants on Counts II through IV The district court's analyses of these issues are thorough and legally sound. Accordingly, we affirm the district court's ruling that the appellants failed to establish per se liability under section 1 of the Sherman Act.

2 The Rule of Reason Violation

[6] Because no theory of per se liability applied to the appellants' claims under section 1 of the Sherman

Act, the appellants may only prevail by demonstrating that BRG's and HBJ's arrangement had an anti-competitive effect in relevant geographic and product markets. Whether the action violates section 1 of the Sherman Act is determined through case-by-case application of the rule of reason when the action is not per se illegal; the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Business Electronics, 108 5. Ct. at 1519.

The district court required the appellants to submit significant probative evidence that the 1980 agreement between BRG and HBJ, as modified in 1982, had an anti-competitive

effect in relevant product and geographic markets. As evidence of anti-competitive effect, the appellants offered the contract itself, the fact that the price went up after the parties signed the contract, and the affidavit of Leon Van Gelderen, a Georgia State School of Law graduate.

The appellants relied on an affidavit of Dr. William Henry, filed February 9, 1987, to address the issues of relevant product market and relevant geographic market. This affidavit stated that the relevant market is "comprehensive bar review courses that prepare students to take the Georgia bar examination" and that the relevant geographic market was "Athens, Georgia, during the winter academic term of law school."

The appellants contend that BRG's and HBJ's 1982 contract modification and subsequent pricing and noncompetitive conduct are evidence of a continuing horizontal conspiracy. The appellants argue that no material facts are genuinely disputed regarding Counts I and II of the complaint (price fixing and market allocation). They contest the district court's denial of their motion for partial summary judgment on liability for those counts. The appellants argue that the district court erroneously applied structural and temporal tests in granting BRG's and HBJ's motion for summary judgment on the appellants' section 1 rule of reason theory. The appellants further contend that their evidence was sufficient to create reasonably conflicting inferences

regarding the unreasonableness of BRG's and HBJ's conduct.

BRG and HBJ contend that the appellants failed to show any basis for a section 1 rule of reason violation. They argue that the appellants' rule of reason analysis suffers from its failure to specify exactly which agreement was unreasonable. BRG and HBJ contend that no significant probative evidence exists in the record from which a jury could reasonably infer that an unwritten agreement existed between BRG and HBJ not to compete against each other in selling bar review courses. BRG and HBJ argue that if the appellants are relying on this unwritten agreement, then the rule of reason analysis ends because no agreement exists to be evaluated.

The second possible agreement upon

which the appellants may have relied was the license agreement between HBJ and BRG when the appellants took their bar review courses. In this agreement, HBJ promised to supply bar review materials to BRG on a nonexclusive basis. The district court found that the license agreement did not contain any anti-competitive provisions. Thus, BRG and HBJ contend that the appellants' failure to prove the existence of an appropriate geographic and product market in which the effects of HBJ's agreement with BRG could be evaluated defeated their rule of reason claim.

In analyzing the appellants' rule of reason claim, the district court examined whether the appellants offered significant probative evidence that BRG's and HBJ's 1980 agreement as modified in

1982 had an anti-competitive effect in relevant geographic and product markets. The district court found that the possibility of anti-competitive effect existed in the contract between BRG and HBJ, which was amended in 1982, to make BRG's license nonexclusive and to delete the covenants not to compete, but that such effect cannot be presumed from the contract itself. The district court found that although the price of BRG's course went up significantly after the 1980 contract signing, this fact did not suffice to demonstrate anti-competitive effect, especially when the price increase came on the heels of West's withdrawal of the free multi-state materials. The district court found that it was as safe to assume that the price increase reflected these additional costs

as it was to assume that the higher prices were merely to gouge the customer. The district court found that the affidavit of Van Gelderen did not add significant evidence on the issue of anti-competitive effect.

Finding flaws in Dr. Henry's affidavit, the district court determined that it was not a substitute for expert product market analysis, and that the anti-competitive effect of the contract was more appropriately measured in a statewide market. The district court also ruled that "Athens, Georgia, during the winter academic term of law school" was not a relevant geographic market. The district court found that no significant probative evidence established that the modified contractual arrangement had a present anti-competitive effect in a

relevant product and geographic market. Accordingly, the court granted BRG's and HBJ's motion for summary judgment on Count I. In reviewing the district court analysis, we affirm.

C. Sherman Act § 2 Analysis

[7] In addressing Count V, conspiracy to monopolize in Georgia; Count VI, attempt to monopolize in Georgia; and Count VII, monopoly in Georgia, the district court examined the appellants' evidence of relevant product and geographic markets and monopoly power or dangerous probability of monopoly. This circuit has held that proof of relevant product and geographic market is absolutely essential to appellants' Section 2 claims." American Key Corp. v. Cole Nat. Corp, 762 F.2d 1569, 1579 (11th Cir.1985). Further, to prove an attempt

to monopolize (Count VI), an anti-trust plaintiff must prove the existence of "methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it ..." American Tobacco Co. v United States, 328 U.S. 781, 785, 814-15, 66 S.Ct. 1125, 1127, 1141-42, 90 L.Ed. 1575 (1946). To prove a claim of monopoly (Count VII), an antitrust plaintiff must prove monopoly power in the relevant market, that is, the power to control prices or exclude competition, United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966).

The appellants contend that they did not have to prove that BRG's and HBJ's

combination had an anti-competitive effect in specifically defined product and geographic market, nor that a particular written contract has a present anti-competitive effect in order to establish the section 2 violation. The appellants argue that the structural standards for proof of unreasonableness contained in both the district court's January 9 and July 8 orders are wrong for three reasons: (1) that proof of specific product and geographic markets is not required in a horizontal rule of reason case to prove anti-competitive effect; (2) the evidence of an anti-competitive purpose alone, even with-out anticompetitive effects, would prove unreasonableness; and (3) evidence that prices were intended to and did "skyrocket," output was reduced, and

consumer choice eliminated is sufficient to prove a rule of reason violation.

Because the district court found that the appellants presented no significant probative evidence that the modified contractual arrangement between BRG and HBJ had a present anticompetitive effect in a relevant product and geographic market, the appellants have no foundation for a section 2 claim. Even so, the appellants argue that evidence of an 800-percent price increase without loss of sales or new entry, two market surveys and unopposed expert opinion showing that defendants control at least 93-percent of any relevant market, and a reduction in output and elimination of consumer choice are sufficient to prove an anti-competitive effect in a relevant product and geographic market. The

appellants argue that the district court transformed their rule of reason claim into a section 2 structural claim and then arbitrarily refused to acknowledge or consider their structural evidence.

The appellants further argue that the district court's conceptions of product market definition, geographic market definition, and anti-competitive effect are contrary to precedent. They assert that the court misread the complaint in reference to their charge of statewide market allocation, ignored a deposition, market survey, and BRG's and HBJ's enrollment contracts demonstrating increasing price without loss of sales statewide, and gave insufficient weight to other affidavits. The appellants also argue that BRG's and HBJ's product is perceived as unique by consumers, its

price is significantly higher than theoretical alternatives, and it has the distinctive properties and discreet vendors. They assert that every criteria for product market identification cited in Brown Shoe v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed. 2d 510 (1962) is satisfied by the record in this case. Thus, the appellants contend that BRG and HBJ took actions to secure, or intended to secure monopoly power in violation of section 2 of the Sherman Act.

BRG and HBJ argue that the authorities cited by the appellants have little to do with the kind, quantum, or quality of proof that a plaintiff must offer to show that an agreement in place between BRG and HBJ in 1985 violated the rule of reason. BRG and HBJ argue that the appellants are simply wrong in

suggesting that a restraint which is not per se illegal does not need to be evaluated within the context of a defined product and geographic market. BRG and HBJ contend that appellants' failure to establish the existence of a relevant product and geographic market thus defeats their section 2 claims.

BRG and HBJ argue that the appellants failed to produce sufficient evidence to avoid summary judgment on their theories with respect to monopolization of alleged Georgia markets. BRG and HBJ contend that the appellants failed to establish the

6. The affidavit states:

Dr. William Henry, being duly sworn, deposes and says:

1.

I am Professor of Finance in the College of Business Administration at Georgia State University with a Ph.D. degree in economics from North Carolina State University, and give this affidavit in the above-captioned matter.

2.

I have reviewed the depositions of the plaintiffs in this action, the deposition of Ronald Pelletier, the enrollment contracts produced by the defendants, and the deposition of Professor David Kamershen taken in the case of

Edwards et al. v. BRG of Georgia, Inc., C.A. No. 82-13-Ath together with the exhibits thereto.

3.

structural elements of the relevant product or geographic market. BRG and HBJ further contend that the section 2 offenses of conspiracy, attempt, and actual monopolization all require the same proof with respect to the structural attributes of the economic market in which the violations are alleged to have taken place. To prevail, BRG and HBJ argue that the appellants must show: (1) the existence of some economically meaningful market, defined by its product and geographic characteristics, and (2)

the existence of monopoly power within the identified market. BRG and HBJ argue that the appellants failed on both accounts. Because the appellants failed to establish any significant probative evidence of conspiracy or agreement, BRG and HBJ contend that all section 2 theories must fail. Also, BRG and HBJ contend that no significant probative evidence has been produced from which a jury could reasonably infer that BRG and HBJ were parties in 1985 to an agreement to give BRG control over any Georgia market.

The district court held that proof of the relevant geographic and product market is essential to all section 2 claims. The district court found Dr. Henry's affidavit to be insufficient to

identify or justify a proper product or geographic market. The district court also found that the entirety of the appellants' effort to identify proper product and geographic markets was contained in the affidavit of Dr. William Henry, filed in opposition to BRG's and HBJ's motion for summary judgment.[6] The

[6]. The affidavit states:

> Dr. William Henry, being duly sworn, deposes and says:
>
> 1.
>
> I am Professor of Finance in the College of Business Administration at Georgia State University with a Ph.D. degree in economics from North Carolina State University, and give this affidavit in the above-captioned matter.
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>
> I have reviewed the depositions of the plaintiffs in this action, the deposition of Ronald Pelletier, the enrollment contracts produced by the defendants, and the deposition of Professor David

> Kamershen taken in the case of Edwards et al. v. BRG of Georgia, Inc., C.A. No. 82-13-Ath together with the exhibits thereto.
>
> 3.
>
> Upon review of the depositions of the named plaintiffs and the deposition of Ronald Pelletier it is apparent that nearly all students at University of Georgia School of Law take the defendants' bar review course. Because the students taking the course are also enrolled as full-time students at the law school in Athens, it is not realistic to expect that they could reasonable [sicl take a course offered outside the Athens area. Further, Ronald Pelletier testified that defendants accounted for at least eighty percent of the sales of bar review courses in the Athens area.
>
> I conclude that a comprehensive bar review course which includes lectures and written material offered in Athens, Georgia to prepare students to take the Georgia bar examination is the relevant product market and that Athens is a relevant geographic market

district court held Dr. Henry's affidavit insufficient to define the relevant product market. Particularly, because Dr. Henry chose to define the product market in such a narrow and seemingly artificial manner, the district court found that the lack of justification for his conclusions rendered it valueless. The district court held the relevant geographic market to be the geographic area of "effective competition" for the product in question. American Key Corp., 762 F.2d at 1581.

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for purposes of economic analysis. I further conclude that defendants have and have had the power to control prices in the market, and that defendants therefore have monopoly power in the relevant geographic and product markets.

This the 12th day of May, 1986.

/s/ William R. Henry

Dr. William Henry

Although the appellants' failure to properly identify relevant product and geographic markets required the district court to grant summary judgment to BRG and HBJ on Counts V through VII, the district court found that Count VI (attempt to monopolize in Georgia) and Count VII (monopoly in Georgia) would have failed for additional reasons. Count VI would have failed under the American Tobacco requirement, and Count VII would have failed under the Grinnell requirement. See supra p. 1426. The district court found that the appellants' only effort to show evidence of these requirements was the conclusory statements of the appellants that they had "no other choice" than the BRG course when they took it in January through February, 1984 in Athens, and the

statement in Dr. Henry's first affidavit that "[further, Ronald Pelletier testified that defendants accounted for at least eighty percent of the sales of bar review courses in the Athens

1. I concur in Part II of the majority opinion (upholding district court's denial of Rule 11 sanctions). I disagree, however, with the majority's conclusion in Part I that the district court's denial of class certification was not an abuse of discretion. The premise of the district court's order was that the plaintiffs "may lack financial commitment sufficient for adequate investigation and trial preparation in light of the court's ruling stating summary judgment on all

counts except the rule of reason claim]." The

area." The district court found that these assertions were "clearly insufficient."

CONCLUSION

Because of the district court's thorough, complete, and correct antitrust analysis regarding the appellants' claims and BRG's and HBJ's motions for summary judgment, we affirm.

AFFIRMED.

CLARK, Circuit Judge, dissenting:

The majority concludes that the district court's analysis of the

procedural and substantive antitrust issues in this case is "thorough, complete, and correct." I dissent.[7]

[7]. I concur in Part II of the majority opinion (upholding district court's denial of Rule 11 sanctions). I disagree, however, with the majority's conclusion in Part I that the district court's denial of class certification was not an abuse of discretion. The premise of the district court's order was that the plaintiffs "may lack financial commitment sufficient for adequate investigation and trial preparation in light of the court's ruling stating summary judgment on all counts except the rule of reason claim]." The record reflects that the plaintiffs' counsel was qualified and experienced, and prepared this case from its inception in a competent and professional manner. The plaintiffs' alleged lack of financial commitment was simply not a factor in their trial counsels' presentation of their case. I believe that the district court's misperceptions regarding the evidence necessary to establish the asserted antitrust violations, discussed infra, resulted in the court erroneously denying class certification based on the plaintiffs' purported "lack of financial commitment." I would therefore reverse the district court on this issue.

I. Facts

The facts in this appeal are relatively simple. From 1976 to the present, defendants BRG of Georgia (BRG) and its owner Ronald Pelletier have offered a comprehensive bar review course in Georgia.[8] The course reviews both the multistate and Georgia portions of the Georgia bar exam through written materials and live and videotaped

[8]. Prior to 1979, BRG's predecessor, defendant Bar Review Group, Inc., offered the bar review course in Georgia. During 1979, Pelletier formed two corporations: BRG of Georgia (BRG) and BRG Publications. For purposes of this opinion, references to the defendant BRG includes Pelletier as well.

lectures by attorneys and law professors. During 1979, BRG was utilizing free multistate materials that West Publishing Company was test marketing.

Harcourt Brace Jovanovich legal and Professional Publications (HBJ) sells comprehensive bar review courses in forty states and is the largest provider of bar review materials and lecture services in the country.[9] HBJ produces and uses its own multistate materials. HBJ began offering a Georgia review on a limited basis in 1976. During the period 1977-79,

[9]. HBJ originally retailed its bar review courses directly to consumers but has since modified its retailing strategy to include about 19 licensees who have the exclusive or non-exclusive right to provide HBJ bar review courses. HBJ does not concurrently offer its course at retail in competition with any of these licensees.

BRG competed directly with HBJ in the provision of comprehensive bar review courses in Georgia.[10] BRG and HBJ were the two dominant providers of bar review courses in Georgia at this time.

Beginning in 1979, BRG conducted an intensive advertising campaign against HBJ which HBJ alleges included false representations about the HBJ course. Vigorous price competition between BRG and HBJ resulted in driving the price of their bar review courses into the range of about $150 per student. The rivalry between BRG and HBJ was rancorous and vitriolic. Each accused the other of engaging in illegal tactics. According to

[10]. The review courses were administered in three cities, Atlanta, Athens, and Macon, where law schools were located.

Richard Conviser, head of HBJ's Legal and Professional Publications, HBJ incurred a loss of $45,000 on revenues of $120,000 in the 1979 price war. At some point during 1979, West Publishing decided to begin selling its multistate materials in bookstores; West therefore decided to charge BRG for the formerly free multistate materials.

Conviser asserts that HBJ unilaterally decided to withdraw from the Georgia market at some future unspecified date after sustaining the 1979 losses and following the death of the attorney who had operated HBJ bar review courses in Georgia. No documentation of this decision, however, exists. Conviser also asserts he was unaware of West's withdrawal of its free multistate materials from BRG at the time HBJ

purportedly decided to withdraw from Georgia.

In early 1980, Conviser and Pelletier got together during a time when BRG and HBJ were still selling bar review courses in Georgia.[11] Within a few months, they entered a written agreement on April 22, 1980 ("1980 agreement")

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[11]. Their first meeting was arranged by one of Conviser's attorneys in Chicago who had contacted Pelletier by phone. Conviser flew to Atlanta, Georgia and met Pelletier at the Coach & Six restaurant where they discussed in passing" the possibility of Bar/Bri purchasing BRG or BRG buying HBJ's Georgia operations. Record, Vol. 1. Tab 2, at 10-11. Pelletier later flew to Chicago where he and Conviser discussed a licensing arrangement or buyout. Id. Pelletier returned to Atlanta where a third meeting was held to discuss a possible licensing arrangement. Id.

which gave BRG the exclusive license to market HBJ's multistate materials in Georgia and the exclusive right to use the Bar/Bri tradename in Georgia. The agreement also contained a provision which required that HBJ not compete with BRG in Georgia and that BRG not compete with HBJ outside of Georgia.[12] Under the

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[12]. The 1980 agreement contained two provisions one termed a "Covenant Not to Compete" and the other entitled "Other Ventures." Record, Vol. 2. Tab 13 at E10, E15. The former required HBJ not to directly or indirectly own, manage, operate, join, invest, control, or participate in or be connected as an officer, employee, partner, director, independent contractor or otherwise with any business which is operating or participating in the preparation of candidates for the Georgia State Bar Examination." Id at E10. The latter required BRG not to compete against HBJ in states in which HBJ currently operated outside the state of Georgia.

agreement, HBJ receives $100 per student enrolled and 40% of all revenues over $350. Soon after their agreement, BRG and HBJ announced in their advertising literature that because of their "combination, Bar/Bri Georgia students will, in essence, have the 'best of both worlds.'"

Immediately following the 1980 agreement, the price of BRG's course increased from about $150 to over $400. Law students who enrolled in the BRG course and paid the increased bar review course prices during the period April 22, 1980 to June 15, 1984, filed an antitrust suit against BRG, HBJ, Conviser, Pelletier, and others. This class action resulted in a settlement which provided

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Id at E15.

class members with partial refunds. While the lawsuit was pending in 1982, BAG and HBJ modified their 1980 agreement by removing the express covenants not to compete and granting BRG the nonexclusive right to use Bar/Bri materials in Georgia ("1982 agreement"). BRG, however, retained the exclusive right to use the Bar/Bri tradename in conjunction with its bar review course in Georgia.

Despite these modifications, HBJ has not competed with BRG in Georgia and has not licensed its multistate materials for use by any other bar review course in Georgia. In addition, BRG has not competed against HBJ outside the Georgia market. The price of the BRG review course has continued to increase also. In 1985 the list price escalated to approximately $825. A group of law

students who enrolled in the BRG course in Athens, Georgia from June 15, 1984 to the present initiated this class action alleging that BRG, HBJ and Pelletier engaged in various antitrust violations.[13]

The law-student plaintiffs in this

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[13]. The nine count complaint alleges the defendants engaged in: (1) horizontal price-fixing; (2) graphic market allocations; (3) concerted refusals to deal; (4) an unreasonable joint venture; (5) a conspiracy to monopolize bar review written materials and lecture services in Georgia; (6) an attempt to monopolize bar review written materials and lecture services in Georgia; (7) monopolization of bar review written materials and lecture services in Georgia; (8) a conspiracy to monopolize bar review written materials and lecture services nationwide; and (9) an attempt to monopolize bar review written materials and lecture servicer nation-wide.

anti-trust action could prove that BRG and HBJ violated the antitrust laws in a number of ways. First, they could demonstrate that the 1980 agreement between BRG and HBJ was a per se violation of the antitrust laws and that the conspiratorial agreement continued despite the defendants' 1982 contractual modifications. Next, if the per se claims fail, they could demonstrate that the 1980 and modified 1982 agreements were unreasonable under the rule of reason. They could also establish that BRG and HBJ conspired to or attempted to monopolize, or succeeded in monopolizing, the

Georgia market for Georgia bar review courses.

The district court held that the 1980 agreement was not illegal under the

per se rule; it therefore did not decide whether the BRG-HBJ conspiracy continued. The district court also found that neither the 1980 agreement nor the modified 1982 agreement violated the rule of reason.[14]

II. Standard of Review

My disagreement with the majority begins with its adoption of an improper standard of review in this summary judgment action. In its recitation of the law on anti-trust summary judgment, the majority relies on Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475

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[14]. In its January 9, 1987 order the court granted the defendants' motion for summary judgment on counts 1-9. The court, however, permitted the plaintiffs to recast counts 1-4 under the rule of reason.

U.S. 574, 106 S.Ct 1348, 89 L.Ed.2d 538 (1986), a predatory pricing action. In Mataushita the Court held that in an action based on a predatory pricing theory "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Id. at 588, 106 S.Ct. at 1357. The plaintiff must therefore provide additional evidence demonstrating that the defendant's conduct was inconsistent with competition. Matsushita's holding is founded on the practical difficulties of differentiating between legitimate and illegitimate business practices (i.e. competitive pricing versus predatory pricing) when the plaintiff's asserted antitrust theory is speculative.

Matsushita is one of two recent Supreme Court decisions which have clarified the applicable standard of review in antitrust summary judgment actions which are based on speculative economic theories. See also Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) (vertical price fixing action brought by a terminated distributor). Both Matsushita and Monsanto presented the Court with the difficult task of defining the proper evidentiary standard for determining under what factual circumstances an illegal antitrust conspiracy may be inferred from parallel conduct and other circumstantial evidence where direct evidence of conspiracy is

lacking.[15]

15. The common concern in Matsushita and Monsanto is that a court's denial of summary judgment based merely on speculative inferences from ambiguous evidence could deter or penalize perfectly legitimate and procompetitive conduct. Because legitimate price-cutting is the very essence of competition," allowing mistaken inferences" to result in antitrust liability chills "the very conduct the antitrust laws are designed to protect." Matsushita, 475 U.S. at 594, 106 S.Ct. at 1360 (citing Monsanto). The Supreme Court therefore adopted more exacting evidentiary standards to separate permissible procompetitive business practices from proscribed anticompetitive practices in antitrust actions based on business conduct that facially supports either practice. Consequently, both cases reinvigorated the use of summary judgment to summarily dismiss certain antitrust actions based on circumstantial evidence and speculative economic theories.

Both Matsushita and Monsanto, however, are distinguishable from the instant action. Neither case involved a consumer action based upon well-established horizontal per se and rule of reason theories where direct evidence establishes an explicit written agreement between two competitors allocating markets and interfering with independent price setting. Instead, the anti-trust claims in Matsushita and Monsanto relied on competitors' predatory pricing and vertical price maintenance theories, respectively, which antitrust scholars and judges have criticized for ensnaring legitimate business practices.[16] It is

16. Criticism of the broad application of predatory pricing theories abounds. See, e.g., R. Blair & D. Kaserman, Antitrust Econmics, 121-128 (1985) (predatory pricing may preserve or enhance, but cannot

therefore doubtful whether the standards announced in Matsushita and Monsanto apply in situations, such as the instant action, where the direct evidence of concerted action is manifest in explicit written agreements between dominant firms allocating and monopolizing the market

create, market power); R. Bork, The Antitrust Paradox: A Policy at War with Itself, 144-59 (1978) (debunking most predatory pricing theories); R. Posner, Antitrust Law: An Economic Perspective, 184-6 (1976) (narrowly limiting predation to practices designed to exclude an equally or more efficient competitor). Vertical price-fixing has also been severely critiqued. See, eg., R. Blair & D. Kaserman, Law and Economics of Vertical Integration and Control, 157-61 (1983) (law condemns vertical price maintenance despite potentially beneficial economic effects); R. Bork, supra, at 280-98 (virtually all vertical restraints benefit consumers and should be lawful).

and interfering with independent price setting. The 1980 BRG-HBJ agreement is a classic example of the most blatantly anticompetitive practices in which horizontal competitors can engage.[17] There is no credible scholarly debate that geographic market allocation and horizontal price-fixing between two dominant firms in an industry are legitimate procompetitive business practices. Thus, the substantive antitrust presumptions that controlled the Court's holding in Matsushita and Monsanto are inapplicable to these types of horizontal agreements whose pro-

[17]. Notably, the plaintiffs in this action allege a conspiracy between two corporations and their respective officers. This situation is unlike the predatory pricing scheme involving twenty-one defendants that the Supreme Court found implausible in Matsushita.

competitive virtues are minimal or nonexistent.

The standard of review in this summary judgment action is that announced in Celotex v. Catrett, 477 U.S. 317, 106 S.Ct 2548, 91 L.Ed.2d 265 (1986) and Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Under Fed.R. Civ.Proc. 56(c), this court must grant summary judgment for defendants if the plaintiffs "fail to make a showing sufficient to establish the existence of an element essential to [their] case, and on which [they] will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S.Ct. at 2552-53 In determining whether the plaintiffs have met their burden, we must view all the evidence, and inferences drawn from such evidence, in the light

most favorable to the plaintiffs and resolve all justifiable inferences in their favor. Anderson, 477 U.S. 242, 253, 106 S.Ct 2505, 2513, 91 L.Ed.2d 202 (1986); Helicopter Support Systems v. Hughes Helicopter, Inc., 818 F.2d 1530, 1532 (11th Cir.1987). One particular piece of evidence, viewed in isolation, may not be sufficiently probative to justify sending a case to the jury; a review of all the evidence collectively, however, may justify such a result. In addition, we may not weigh conflicting evidence to resolve disputed factual issues. Instead, if a genuine issue of material fact exists, we must deny summary judgment. Helicopter Support Systems, 818 F.2d at 1532 (moving party has burden of demonstrating the absence of a genuine issue of material fact

viewing the evidence in the light most favorable to the non-moving party; "A court must deny summary judgment if reasonable minds could differ as to the factual inferences to be drawn from undisputed facts").

A thorough review of the entire record indicates that the plaintiffs have produced sufficient evidence to survive summary judgment on their price-fixing, market allocation, rule of reason, and monopolization claims under applicable Supreme Court precedents. Each of these claims relies upon well-established economic theories.[18] Further, they

[18]. The plaintiffs' price-fixing and market allocation claims are the types that courts and economists have long condemned as per se violations of the Sherman Act. Their rule of reason and monopolization claims are similarly founded upon widely accepted economic principles.

support their claims with direct evidence of concerted action (including an explicit written agreement) that excludes the possibility of legitimate independent action. In addition, they have provided substantial expert economic analysis which demonstrates the adverse economic consequences of the defendants' conspiratorial agreement.

III. Per Se Claims

The district courts analysis of the plaintiffs' per se claims[19] contrary to

[19]. Per Se rules are appropriate only for conduct which is manifestly anticompetitive and should be "invoked when surrounding circumstances make the likalihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 103-04, 104 S.Ct. 2948, 2961, 82 L.Ed.2d 70 (1984).

well-established antitrust case law. Under binding Supreme Court precedent, the 1980 agreement between HBJ and BRG falls within one of two recognized per se categories: market allocation and price-fixing.[20] The district court, however, misapplied the proper test on both claims. In addition, there is sufficient evidence of an unlawful agreement and continuing conspiracy between the defendants to survive a summary judgment motion.

A. HBJ and BRG are Horizontal Competitors

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[20]. The Supreme Court has applied the per se rule to geographic market allocation and horizontal price-fixing because such practices are so plainly anticompetitive that no elaborate study of an industry is necessary to establish their illegality. National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978).

As an initial matter, HBJ and BRG argue that the plaintiffs' horizontal per se theories do not apply to them because they are in a vertical supplier/retailer relationship. They further urge that HBJ's asserted unilateral decision to withdraw from the Georgia market in early 1980 instantaneously transformed HBJ's relationship from a horizontal to vertical one thus precluding horizontal per se theories. These arguments, however, are simply disingenuous and meritless.

It is firmly established that entities in a seemingly vertical relationship may be capable of horizontal restraints if they are actual or potential competitors.[21] During the

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[21]. Abadir Co. v. First Mississippi Corp., 651 F.2d 422, 426-427 (5th Cir.Unit A July 1981) (competitors not

period 1976-1980, both HBJ and BRG were direct, fierce and antagonistic competitors in the Georgia bar review course market. Because the HBJ and BRG courses were separate and distinguishable brands of comprehensive bar review courses, BRG and HBJ were horizontal competitors engaging in inter-brand competition.[22] In addition, HBJ and BRG

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allowed to turn an otherwise horizontal agreement vertical by setting up a licensing corporation to impose market allocation agreements); see, e.g., U.S. v. Topco Associates, Inc., 405 U.S. 596, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515 (1972) (cooperative buying association which allocates territories violates horizontal per se rule); U.S. v. Sealy, Inc., 388 U.S. 350, 87 S.Ct. 1847, 1850, 18 L.Ed.2d 1238 (1967) (characterizing licensor-licensee relationship as horizontal where licensees own substantially all stock of licensor).

[22]. Agreements between horizontal competitors that affect inter-brand competition are the "primary concern of antitrust law." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.

have always been and continue to be at least potential competitors.[23] Simply stated, BRG and HBJ cannot have it both ways-either they are horizontal competitors because HBJ can reenter the Georgia marketplace and compete with BRG or they are co-conspirators acting in concert to prevent such competition between themselves.

Further, HBJ and BRG's assertion that HBJ's "withdrawal" from the Georgia market somehow altered BRG's and HBJ's status as actual or potential competitors is disingenuous. Their argument would

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19, 97 S.Ct. 2549, 2558 n. 19, 53 L.Ed.2d 568 (1977).

[23]. Both provide the same type of service, bar review courses, and both are capable of providing their services in the same geographic locations (absent their agreements).

essentially nullify the per se rule because horizontal competitors could avoid antitrust liability by simply entering into anticompetitive agreements that have vertical aspects. Instead, a court must view an arrangement's economic substance rather than its form.

> The rationale for each per se rule is an economic analysis of the agreement, an analysis of the potential economic advantages which might motivate the parties to a particular type of agreement. A per se rule is applicable to a particular case if and only if the economic analysis which justifies the rule applies to the particular case.

Abadir & Co. v. First Mississippi Corp., 651 F.2d at 426. Given that HBJ vigorously competed and then joined forces with BRG following meetings between Pelletier and Conviser, the indisputable conclusion is that BRG and HBJ were, and continue to be, capable of engaging in per se horizontal restraints.

B. Market Allocation

The district court erroneously concluded that to prove a per se violation under a geographic market allocation theory the plaintiffs had to show that BRG and HBJ have subdivided some relevant market in which they previously competed.[24] Because BRG and

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[24]. The district court stated that:

> Neither agreement between BRG and [HBJ] constitutes the sort of market or customer allocation agreement which has been recognized as a basis of per se liability. Cf. Topco, 405 U.S. 596 [92 S.Ct. 1126]. This is not a situation where competitors divided up a market in which both have previously done business, each taking a portion of a market. BRG has never done business outside the state of Georgia, and nothing in the record suggests that it ever intended to do so. [HBJ1 as noted has done business virtually nationwide, but withdrew from the Georgia market following the 1980 agreement between BRG and [HBJ]. Thus, the only market ever claimed by both Defendants is the state of Georgia, and clearly the state of Georgia was not

HBJ did not divide the Georgia marketplace between themselves, the trial court reasoned that no Sherman section 1 violation occurred. The court, however, made an erroneous legal distinction between the terms "divide" and "allocate."

Well-established case law demonstrates that the allocation of markets or sub-markets by competitors is a per se antitrust violation. In United States v. Topco Associates, Inc,, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), the Supreme Court held that agreements between competitors to allocate territories to minimize

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divided up under either the 1980 or 1982 agreements.

Order, January 9, 1987 at 8 (emphasis added).

competition are per se unlawful:

> One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.... This Court has reiterated time and time again that "[h]orizontal territorial limitations ... are naked restraints of trade with no purpose except stifling of competition." Such limitations are per se violations of the Sherman Act.

Id. at 608, 92 S.Ct at 1133-34 (emphasis added) (citations omitted). See also E. Sullivan & J. Harrison, Understanding Antitrust and Its Economic Implications, § 4.14 at 111 (1988) ("A horizontal market division is created when competitors agree not to compete in a designated market."). The defendants in Topco did not divide a market in which they had previously competed; they simply agreed to allocate markets. See also Gainesville Utilities v. Florida Power & Light Co., 573 F.2d 292, 299-300 (5th

Cir.1978) (horizontal market division per se violation), cert. denied, 439 U.S. 966, 99 S.Ct 454, 58 L.Ed.2d 424 (1978). Thus, market division is simply a subset of market allocation both of which are per se antitrust violations.[25]

In this action, HBJ and BRG allocated designated markets: BRG received the Georgia market while HBJ received the balance of the United States. Each agreed not to compete in the other's respective market. The district court therefore erred in failing to classify this market allocation agreement as a per se violation.

C. Price-Fixing Claim

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[25]. To use the district court's parlance, BRG and HBJ divided the Georgia market by allocating 0% for HBJ and 100% for BRG and divided the national market by allocating 100% for HBJ and 0% for BRG.

The plaintiffs also claim that BRG and HBJ entered into their 1980 agreement with the primary purpose of eliminating price competition between themselves in the Georgia marketplace. They assert that the license fee and revenue-sharing agreement between BRG and HBJ is the mechanism that facilitates the defendants' purpose in raising the price of bar review courses and distributing the resulting profits. BRG and HBJ disavow any intent to restrain trade and claim that their agreement is "nothing more than an ordinary copyright royalty arrangement" which courts have "routinely sustained." The district court held there was no per se violation because the agreement neither explicitly set prices

nor was it inherently anticompetitive.[26]

The district court's analysis of the plaintiffs' price-fixing claim is incomplete in at least two important respects. FIrst, the fact that the agreement between the defendants did not explicitly address pricing and HBJ did not have the express right under the agreement to be consulted about the prices BRG charged for bar review

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[26]. The district court held that:

the agreement is not a classic form of price fixing where two competitors agree what price they will charge for their products. On the contrary, neither agreement explicitly addresses the factor of price, and [HBJ) has never had any right under either the 1980 or 1982 agreement to be consulted about the price of the BRG course. While it is true that the agreement of two competitors to "pool" their products may exert an upward influence on price, such an agreement is not inherently anticompetitive, and in a given setting could actually be procompetitive.

Order, January 9, 1987, at 7-8.

courses, does not exclude the possibility of a price-fixing violation. Second, the district court erred in finding that the revenue-sharing agreement was not inherently anticompetitive because the record establishes that the purpose and effect of the agreement was to increase the price of bar review courses.

It is clear that a horizontal price-fixing violation does not require that the defendants literally fix prices. Instead, "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84, L.Ed. 1129 (1940). For instance, price-fixing

results when competitors agree to some non-price restrictions that directly and adversely affect the market prices for their goods or services.[27] Such indirect methods of raising prices injure consumers as much as direct, overt price setting.

In contrast to such indirect methods, the combination of the defendants' licensing and revenue-sharing agreements has a direct upward effect on price because it requires BRG to set the price of its bar review course above $350

[27]. See, e.g., Catalano Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980) (horizontal agreement to terminate the practice of giving credit falls squarely within the traditional per se rule against price-fixing); National Society of Prof. Eng. v. U.S., 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (agreement that interferes with setting of price by free market forces is illegal on its face).

before revenue sharing begins. It also totally eliminates HBJ's incentive to compete with BRG in Georgia. First, HBJ has little incentive to compete with BRG because any resulting price competition would reduce HBJ's profits under the agreement's revenue-sharing provision. Second, BRG has the exclusive right to use the Bar/Bri tradename in Georgia thus precluding HBJ from using its own multistate materials and its own tradename. The combination of the licensing and revenue-sharing provisions have the effect of stifling competition and maintaining BRG's (and indirectly HBJ's) dominance in Georgia.

The second error in the district court's analysis relates to the possible justifications for the defendants' conduct. The district court correctly

noted that because some horizontal agreements have procompetitive potential, not all horizontal agreements among actual or potential competitors that have an impact on price are per se violations. For example, some joint ventures and other cooperative arrangements are not per se violations because an agreement on price is necessary to market the product.[28]

In determining whether a challenged practice is a per se violation or subject to a rule of reason, a court must inquire

[28]. See, e.g., National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 101, 104 S.Ct. 2948, 2960, 82 L.Ed.2d 70 (1984) (horizontal restraints on competition necessary if product is to be available); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 21-22, 99 S.Ct. 1551, 1563, 60 L.Ed.2d 1 (1979) (horizontal licensing arrangement created product which was "greater than the sum of its parts").

into whether the practice always or almost always tends to raise price and restrict output or instead is likely to assist the creation of economic efficiency. Rigid line drawing must be avoided and close attention given to procompetitive, efficiency-creating integration that is accomplished as the result of an outwardly anticompetitive, yet ancillary, restraint. National Bancard Corp. v. VISA, U.S.A., Inc., 779 F.2d 592 (11th Cir.1986), cert. denied, 479 U.S. 923, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986).

Here, in contrast, the record is devoid of any evidence that the agreement between HBJ and BRG was ancillary or that it had some procompetitive, efficiency-creating potential. Furthermore, there is no evidence that it was necessary for HBJ

and BRG to combine their resources to provide a bar review course in Georgia particularly when they had competed for several years prior to their price war. The use of restrictive covenants in the 1980 agreement further buttresses the inference that the defendants' purpose in allocating the Georgia market was to reduce competition between themselves and ultimately to raise prices and reduce output.[29]

It is worth reiterating that the 1980 agreement totally eliminated price and inter-brand competition between HBJ and BRG in the Georgia market and there are no apparent economies of scale or

[29]. See Cititens Publishing Co. v. United States, 394 U.S. 131, 134-36, 89 S.Ct. 927, 928-29, 22 L.Ed.2d 148 (1969) (market allocation agreement designed to prevent commercial rivalry and support price fixing conspiracy).

other cost savings to counterbalance this anticompetitive result. HBJ could have sold its materials to BRG without entering such a blatantly anticompetitive agreement.[30] Instead, the two principal competitors in the Georgia market have accomplished through their written agreement and subsequent actions what the antitrust laws were designed to prevent: injury to the consumer.

The evidence establishes that the 1980 agreement between BRG and HBJ is per se illegal under binding Supreme Court prece-dent. The written agreement has the effect of reducing price competition in Georgia and markets into which BRG might have otherwise entered absent the agreement. The agreement also has no redeeming procompetitive virtues. Thus,

[30]. See infra note 31.

the trial court erred by too narrowly construing the rule against horizontal price fixing and should have condemned the defendants' agreement as being per se illegal.[31]

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[31]. Because the district court erred in finding that the 1980 agreement did not constitute a per se violation, it did not address whether the 1982 modified agreement constituted a withdrawal from or abandonment of the conspiracy. In United States v. 218 US. 601, 31 S.Ct. 124, 54 L.Ed. 1168 (1910), the Supreme Court held that antitrust conspiracies may continue in time beyond the original conspiratorial agreement until either the conspiracy's objectives are abandoned or succeed. Id. at 608-09, 31 S.Ct. at 126. For example, a conspiracy' continues so long as one or more conspirators continue to receive payments under a collusive contract because the conspirators continue to realize a central and obvious objective of the conspiracy (i.e. illicit profits). United States v. Dynalectric Co., 859 F.2d 1559, 1563-69 (11th Cir.1988); United States v. Aquafredda, 834 F.2d 915, 919 (11th Cir.1987) cert. denied sub nom., Agostino v. United State', -U.S.-, 108 S.Ct. 1278, 99, L.Ed.2d 489 (1988). In the absence of proof of withdrawal, the conspirators are presumed to continue in their conspiracy particularly where they continue to share

IV. Rule of Reason Claim

Although the 1980 agreement is a per se violation, the plaintiffs may also show that the 1980 agreement and its subsequent 1982 modifications violate the rule of reason. The district court found that neither the 1980 nor the reformulated 1982 agreements violated the rule of reason because the plaintiffs failed to demonstrate any actual anticompetitive effects. The district

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the fruits of their conspiracy, in this case through the revenue-sharing provision in the 1980 and 1982 agreements. Dynalectric, 859 F.2d at 1563-69; Aquafredda, 834 F.2d at 919 (antitrust defendants' continued sharing of revenues and professional and social affiliations permits inference of continued conspiracy). Thus, it is an unsettled factual issue whether the conspiratorial objectives manifest in the 1980 agreement between HBJ and BRG have continued despite the supposedly ameliorative modifications made in 1982.

court erred in its findings and also failed to apply the proper analysis under the rule of reason.

Under the rule of reason, a "factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V. v. GTE Sylvania, Inc.,
433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1978). Although the rule of reason will often require a careful balancing of a challenged restraint's harms, benefits, and alternatives, a court can readily condemn a challenged restraint on summary judgment when the restraint directly limits competition on price or output and has no procompetitive justification. P. Areeda, Antitrust Law ¶

1508, at 403 (1986); see also NCAA, 468 U.S. at 109, 104 S.Ct. at 2964. Under the rule of reason, a sliding scale has developed which permits antitrust plaintiffs to demonstrate a lower threshold level of anticompetitive effect the more egregious the defendants' challenged practice or restraint. A demonstration of anticompetitive effect or market power, however, may not be necessary in cases where the challenged restraints are sufficiently "naked" in the sense that they directly restrain price or output.

A. The Rule of Reason Under Indiana Federation of Dentists

Under the rule of reason as enunciated in FTC v. Indiana Federation of Dentists, 476 U.S. 447, 106 S.Ct 2009,

90 L.Ed.2d 445 (1986),[32] the plaintiffs in this action can demonstrate an antitrust violation in one of two ways.

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[32]. In Indiana Federation of Dentists, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) a group of dentists decided to stop supplying x-rays of their patients' mouths to the insurance company paying the bill. The Supreme Court held that this practice is an illegal horizontal agreement that withheld from dental customers a particular service the customers desired. "Absent some countervailing procompetitive virtue-such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' cannot be sustained under the Rule of Reason." 476 U.S. at 459, 106 S.Ct. at 2018 (citations omitted). Additionally, the Court reiterated that the FTC's absence of specific findings, regarding market definition and market power does not preclude, as a matter of law a finding that the dentists unlawfully restrained trade. Id. at 460, 106 S.Ct. at 2018-19. Instead, actual proof of detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power. Id. at 460-61, 106 S.Ct. at 2019.

The first requires that the plaintiffs demonstrate that the 1980 agreement between BRG and HBJ imposed a "naked" restriction on output or price; in this instance, the plaintiffs would not have to define a relevant market or show market power. BRG and HBJ, however, would have to provide a countervailing procompetitive virtue to avoid liability. Under the second method, if the agreement is not sufficiently "naked," the plaintiffs can show actual detrimental effects, such as a reduction of output or increased price, instead of an inquiry into market power.

B. BRG-HBJ Agreement is a "Naked" Restraint

Under the first method, the 1980 BRG-HBJ agreement is a blatant "naked" restriction on output because it

allocated markets and thus prevented HBJ from selling its bar review materials to any course provider other than BRG in the Georgia market. This along with the exclusive tradename provision perpetuated BRG's, and indirectly HBJ's, economic dominance in the Georgia bar review course market. The plaintiffs therefore did not have to provide evidence of a relevant market or market power to prevail on their claim. Instead, the burden shifted to defendants to provide evidence of some procompetitive efficiency-enhancing virtue to their agreement, which they failed to do. The district court erred in holding that the BRG-HBJ agreements were not presumptively anticompetitive under the rule of reason.

C. Anticompetitive Effects

Under the second method, the plaintiffs must prevail because they have demonstrated actual detrimental effects:[33] the price of bar review courses has increased dramatically with no sufficient cost-based explanation and BRG and HBJ's non-competition agreement has reduced consumer choice and reduced output.

The plaintiffs introduced evidence of a dramatic price increase which immediately followed the defendants' 1980 agreement. The district court rejected the conclusion that this price increase was an anticompetitive result of the

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33. Because they have shown anticompetitive effects, the plaintiffs would not have to establish a relevant market or that the defendants had market power.

defendants' agreement.[34] A review of the record, however, indicates that a genuine issue of material fact regarding actual and continuing anticompetitive effects exists thus precluding summary judgment for the defendants on the plaintiffs' rule of reason claims.[35]

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[34]. Instead, the district court held "it is as reasonable to assume that the price increase reflected [additional multistate] costs as it is to assume that the higher prices were merely to gouge the consumers." Order, July 8, 1987 at 5. The trial court also held that the plaintiffs failed to demonstrate that the defendants' modified contractual arrangement had a "present anticompetitive effect in a relevant geographic and product market." Order. July 8, 1987, at 7 (emphasis added).

[35]. Plaintiffs in a rule of reason case do not have to demonstrate a present anticompetitive effect in a specifically-defined product and geographic market if they can establish the existence of anticompetitive effects or purpose during the time period that the anticompetitive practices were allegedly in effect. These anticompetitive effects can be inferred from the price increases following the

1. Price Increases

The record indicates that the price of BRG's bar review course in Georgia has increased from $150 in 1979 to a list price of $825 in 1985. This increase in price is obviously detrimental to consumers of Georgia bar review courses yet the district court held that the increase does not necessarily establish anticompetitive effect because BRG's costs may have increased because West Publishing no longer made its free

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HBJ-BRG agreement (and the resulting reduction in the number of bar review courses sold), the licensing and revenue-sharing provisions, and the elimination of consumer choice through HBJ's withdrawal from the Georgia market.

multistate materials available.[36] The court's analysis, however, neglects the anticompetitive effects inherent in the defendants' licensing fee and revenue-sharing provisions contained in both the 1980 and 1982 agreements.

The district court is correct in concluding that the possibility of anticompetitive effect exists and that the price increase of BRG's bar review course may be attributable, in part, to the cost of multistate materials that BRG must now bear due to West Publishing's decision to charge for its previously

[36]. The district court concluded that "[u]nder the circumstances, it is fair to conclude that the possibility of anticompetitive effect exists, but that such effect cannot he presumed from the contract itself." Order, July 8, 1987, at 4.

free materials.[37] These increased costs, of course, are increased revenues for HBJ. Under their agreements, BRG pays HBJ $100 per student enrolled and BRG and HBJ jointly share any price increases above $350. Thus, any price increase imposed

[37]. An important factual issue is whether BRG's and HBJ's agreements are necessary for either's competitive survival. First, no evidence exists to explain why BRG had to use Bar/Bri's multistate materials much less have the exclusive right to the Bar/Bri tradename. Other sources of multistate materials existed. For instance, West Publishing's materials were still available albeit not free. Pelletier Deposition, at 73. Second, although HBJ would forego income by not selling its multistate materials to some other bar review course in Georgia, no legitimate reasons exist to explain why it was necessary for HBJ to form an agreement with its only rival in Georgia that contains blatantly anticompetitive licensing, revenue-sharing, and market allocation provisions. A plausible explanation is BRG's and HBJ's collective desire to profit by eliminating their rivalry and sharing the increased revenues that would result from BRG's new-found dominance in the Georgia market.

on BRG bar review consumers above $350 results in increased revenues to both BRG and HBJ. For instance, for each bar review course BRG sells at the 1985 list price of $825, HBJ receives $190 (40% of $475) plus the $100 per student licensing fee. At the $825 list price, HBJ receives a total of $290 per course sold while BRG receives the balance of $535 per course. The revenue-sharing provision, therefore, minimizes HBJ's incentive to compete with BRG because any resulting price competition would reduce HBJ's profits under the agreement. Similarly, the revenue-sharing provision also minimizes HBJ's incentive to license its multistate materials to other bar review courses in Georgia because such courses would compete with BRG and further reduce HBJ's profits.

Thus, it is a disputed factual issue whether the price increases resulted from reduced competition following HBJ's "with-
drawal" or from BRG having to pay additional production costs and salaries. It may be that a large portion of BRG's increased "costs" may simply be HBJ's share of the increased revenues resulting from less price competition. The defendants failed to offer any evidence to rebut the strong inference that the price increases resulted in large part from the defendants' agreements and their adverse effects on competition in the Georgia bar review markets.

2. Bar/Bri Tradename

In addition to price increases, BRG's retention of the exclusive right to

use the Bar/Bri tradename on Georgia materials under the 1982 agreement effectively prevents HBJ from competing with BRG or licensing its multistate materials to any other potential providers of bar review courses in Georgia. In fact, the Bar/Bri tradename has displaced the BRG tradename making BRG and Bar/Bri synonymous as a common business entity in the Georgia marketplace. The defendants' argument that another competing bar review in Georgia could use the Bar/Bri materials under another tradename such as "HBJ Georgia" and compete effectively is highly speculative.

D. Summary

In sum, the plaintiffs have demonstrated that the 1980 agreement and

its modifications impose sufficiently "naked" restraints on price and output making an elaborate inquiry into market analysis unnecessary. Even if the 1980 agreement and its 1982 modifications were legally not sufficiently "naked," the plaintiffs have demonstrated sufficient actual, sustained detrimental effects on competition to survive summary judgment.

V. Sherman Section Two Claims

The plaintiffs allege that the defendants conspired to monopolize,[38]

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[38]. A conspiracy to monopolize requires (1) proof of concerted action deliberately entered into with the specific intent to accomplish the unlawful result of achieving a monopoly; and (2) the commission of at least one overt act in furtherance of the conspiracy. Under a conspiracy theory, the defendants do not have to attain monopoly power nor would they have to obtain monopoly power if their conspiracy had been successful. L. Sullivan, Handbook on the Law of Antitrust 132-34

attempted to monopolize,[39] and monopolized [40] the Georgia market (and relevant submarkets) for bar review courses that prepare law students for the

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(1977).

[39]. Attempted monopolization is an offense distinct from monopolization which requires (1) a specific intent to monopolize and (2) a dangerous probability of success. Lorain Journal Co. v. United States, 342 U.S. 143, 153, 72 S.Ct. 181, 186, 96 L.Ed. 162 (1951). The most important evidence of defendants' specific intent to monopolize is anticompetitive conduct. A dangerous probability of success is measured by a defendant's possession of substantial market power.

[40]. The offense of monopoly under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market and (2), the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident. United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966).

Georgia bar. The district court granted summary judgment in defendants' favor on these counts because it held that the plaintiffs failed to properly identify the relevant product and geographic markets. The court refused to consider additional economic evidence on these claims despite considering such evidence under the plaintiffs' rule of reason claim.

A. Monopoly Power

Under Sherman section 2, a plaintiff must demonstrate that the defendant(s) have either monopoly power or substantial market power in a relevant product and geographic market.[41] In its attempt to

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[41]. Monopoly power is defined as the power to control price or exclude competition and is measured by reference to the relevant market. United States v. E.l. du Pont de Nemours & Co., 351 U.S.

evaluate what degree of economic power the defendants exercised in the relevant market, the district court discounted most of the plaintiffs' totally uncontested evidence.[42] The district court held that "the entirety of Plaintiffs' effort to identify the proper product and geographic markets is contained in the affidavit of Dr. William

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377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264. Market share is the traditional measure of market and monopoly power. United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966) (90% share of relevant market constitutes monopoly power, over 80% share a "substantial monopoly"). The determination of the relevant product and geographic markets (and a defendant's market share), however. is not an exact science and mathematical precision may, at times, yield to administrative convenience.

42. The defendants submitted no evidence to rebut the plaintiffs' market structure analysis.

Henry.... Doctor Henry's affidavit is insufficient to identify or justify a proper product or geographic market." Order, January 9, 1987 at 12. The court held that Dr. Henry's conclusions were "valueless" because he defined the product market in a "narrow and seemingly artificial manner without economic justifications." Id. The court also rejected Dr. Henry's conclusion that Athens, Georgia was a relevant submarket. The court stated that Dr. Henry's analysis did not address "that area in which the product is offered, but rather limits its consideration to the place where the course is administered during the school year." Id.

The district court did not include in its market analysis the deposition of expert witness Prof. David Kamerschen

(including exhibits),[43] the depositions and affidavits of members of the law student class, and the survey data and affidavit provided by Prof. Ponsoldt. The court also neglected Dr. Henry's second affidavit and the defendants' own marketing literature and deposition testimony. These additional materials provide a vivid description of the product and geographic market structure issues relevant to the resolution of the claims in this case.

1. Geographic Submarkets

The court erred in failing to recognize Athens, Georgia as a relevant submarket for Sherman section 2 analysis.

43. Kamerschen's deposition was the principal economic evidence upon which the first class action was based.

The district court correctly notes that BRG offers its review course on a statewide basis.[44] The district court, however, rejected the plantiff's contention that Athens, Georgia was a relevant submarket[45] despite uncontested expert testimony and survey data which indicates that law student preferences and high transportation costs separate Athens from the Atlanta and Macon markets. In addition, 1986-87 survey data

44. "[T]he record discloses that BRG's course is marketed statewide, and is offered at various statewide locations both during the school year and following the close of the school year." Order, January 1, 1987 at 12. The court however failed to consider whether Georgia is a relevant geographic market despite evidence suggesting such a conclusion.

45. The Supreme Court in United States v. Grineoll Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), stated that under Sherman section 2 "there may be submarkets that are separate economic entities."

show that approximately 90% of University of Georgia third year law students take the BRG course during the winter term when they are still enrolled in school.[46] Yet, the district court discounted all this evidence.

Further, the record indicates that BRG and HBJ combined for at least 80% of the Athens market prior to their agreement. Pelletier Deposition at 130. The district court confirms this fact stating that the "vast majority" of University of Georgia law students who took a bar review course conducted in Athens, took either the "Harcourt or the

[46]. Prof. Ponsoldt conducted the survey of all third year students at the University of Georgia. The survey indicated it was being conducted in "context of a pending federal antitrust case against certain bar review course companies." Record, Vol. 2, Tab 31 at 8. 63 of the 170 third year students responded. Id. at 3.

BRG course" in 1979. Subsequent survey data of University of Georgia law students, who basically constitute the entire Athens market, indicates that BRG has over 95% of the Athens market. Ponsoldt Affidavit, Record Vol. 3, Tab 31, at 3.

2. Relevant Product Market

The plaintiffs presented evidence that the relevant product market is comprehensive bar review courses including lectures and written materials that prepare students to take the Georgia bar exam.[47] The district court, however, held that the plaintiffs failed to establish a relevant product market

In Brown Shoe Co. v. United States,

[47]. See, e.g., Henry Affidavit, Record, Vol. 2, Tab 17.

370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962), the Court stated:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product market for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the products's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Id. at 325, 82 S.Ct. at 1523-24. The district court's analysis is contrary to Brown because the plaintiff presented evidence indicating that (1) University of Georgia law students perceived no reasonable alternatives to the comprehensive BRG review course; (2) third year law students (in particular winter semester third year students) are

distinct consumers, and (3) law student consumers were insensitive to price increases because they continued to purchase the BRG course even after large price increases. The defendants own advertising literature and deposition statements also reflect their perception that comprehensive bar review courses that prepare students for the Georgia bar constitute a relevant product market.

This uncontroverted evidence provides substantial support for the plaintiffs' Sherman section 2 claims. Thus, the district court erred in granting summary judgment for the defendants because the plaintiffs' evidence raises a genuine issue of fact regarding whether the defendants violated Sherman section 2.

VI. Conclusion

In conclusion, the district court failed to adequately analyze the plaintiffs, per se price-fixing and market allocation claims. The plaintiffs have demonstrated that BRG and HBJ conspired to restrain trade and entered an explicit written agreement in 1980 which was per se illegal. It remains a factual issue whether the defendants have withdrawn from this conspiratorial agreement. The trial court also erred in failing to properly analyze the plaintiffs, rule of reason claim. The plaintiffs have presented sufficient evidence that the defendants entered an agreement that directly restrained competition in the Georgia bar review market. The plaintiffs have also demonstrated actual anticompetitive

effects arising from the agreement. This same economic evidence supports the plaintiffs' Sherman section 2 claims. I would reverse the district court's summary judgment and all of the foregoing issues.

[APPENDIX B]

Jay PALMER, et al.,
Plaintiffs-Appellants,

v.

BRG OF GEORGIA, INC., a Georgia Corporation, d/b/a Bar/Bri, et al.,
Defendants-Appellees.

No. 87-8804.

United States Court of Appeals,
Eleventh Circuit.

Jan. 29, 1990

John C. Butters, Atlanta, Ga., James

Ponsoldt, Athens, Ga., for plaintiffs-appellants.

Trammell Newton, Jones, Day, Reavis & Pogue, Kevin E. Grady, Alston & Bird, Atlanta, Ga., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Georgia.

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion June 7, 1989, 11th Cir. 874 F.2d 1417).

Before HATCHETT and CLARK, Circuit

Judges, and FITZPATRICK[48], District Judge.

BY THE COURT.

Our opinion reported at 874 F.2d 1417 (11th Cir. 1989) is amended by adding the following language on page 1424, right column, following the citation to Citizens Publishing Co. v. United States, 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969).

> We agree with the district court that the modified agreement (1982) is not a market allocation agreement to which per se liability applies. First, the agreement is not a "naked agreement" between competitors to allocate the market. Second, HBJ and BRG are not horizontal competitors.

48 Honorable Duross Fitzpatrick, U.S. District Judge for the Middle District of Georgia, sitting by designation.

> HBJ's affidavit states that it is no longer a competitor in the Georgia market. The appellants have failed to produce evidence to the contrary. In the absence of evidence other than the affidavit on this issue, we cannot conclude that HBJ is doing business in Georgia.

In all other aspects, the opinion is reissued. Judge Clark adheres to his dissent.

The petitions for rehearing are denied and no member of this panel nor other judge in regular active service on the court having requested that the court be polled on rehearing in banc (Rule 35, Fed.R.App.P.; 11th Cir.R. 35-5) the suggestions of the rehearing in banc are denied.

[APPENDIX C]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAY PALMER; MICHAEL CHIDISTER;
TREI L. POWERS; DAVID DUNBAR
WILLIAM FURGUSON; BENJAMIN FIRST

vs. CIVIL NO.
C85-4377

BRG OF GEORGIA, INC., a Georgia
Corporation (d/b/a "BAR/BRI" in
Georgia); BAR REVIEW, INC., a
Georgia corporation; BRG
PUBLICATIONS, INC., a Georgia
Corporation; HARCOURT BRACE

JOVANOVICH LEGAL AND PROFESSIONAL
PUBLICATIONS, INC., a Delaware
Corporation (d/b/a "BAR/BRI"
nationally); RONALD O. PELLETIER

ORDER

This antitrust action is before the court on Defendants' motion for summary judgment on all counts and Plaintiffs' cross motion for summary judgment on the issue of liability on one count.

The present action was brought by six 1985 graduates of the University of Georgia Law School in Athens, Georgia. Each of the Plaintiffs took a bar review course offered by BRG of Georgia, Inc. (BRG) in January/February of 1985 in

preparation for the Georgia bar exam.[49] Defendant Ronald O. Pelletier owns BRG, which was formed in 1979 for the sole purpose of offering bar review courses to Georgia bar applicants.

In 1979, BRG began offering a bar review course.[50] The course covered both the multi-state and the Georgia law components of the Georgia bar exam. It included written materials, plus live and videotaped lectures by lawyers/law professors. At this time, BRG was able to use standardized materials provided

[49] Defendants BRG Publications, Inc. and Bar Review Group, Inc. are related corporations which have been defunct at relevant times and had no involvement in any allegedly anti-competitive activities. These defendants are GRANTED summary judgment on all counts.

[50] Prior to that, Defendant Bar Review Group, Inc. offered Georgia courses. BRG was its successor.

free by West Publishing Company, which was test marketing them. The availability of the free multi-state materials enabled BRG to offer the bar review course at a lower price than it would have charged otherwise.

For many years, Defendant Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("Harcourt") has offered bar review courses virtually nationwide under the trade name "Bar/Bri." It began offering a review course for the Georgia exam in 1973. The record does not contain a precise description of Harcourt's Georgia course, but the parties state that it was similar to the format of the BRG course. Harcourt developed its own standardized multi-state materials and sold these as part of its Georgia course.

In 1979, BRG and Harcourt competed in Georgia. BRG conducted and intense advertising campaign which Harcourt contended included false representations. In response to the low price of BRG's course, Harcourt reduced the price of its Georgia course. Harcourt lost money on its Georgia course in 1979.[51]

At some time in 1979, West Publishing Company informed BRG that it planned to sell its multi-state materials through book stores. Therefore, the would no longer be furnished. At about the same time, the lawyer who had been in charge of conducting Harcourt's Georgia course had a heart attack. Richard Conviser, chairman of Harcourt's board of

[51] Mr. Conviser's affidavit states that Harcourt lost $45,000.00 on revenues of $120,000 without accounting for headquarters overhead.

directors, states in his affidavit that Harcourt decided it would withdraw from the Georgia market, but no documentation of this decision has been offered. Plaintiff's question this testimony of Conviser's.

In any event, in early 1980, Messrs. Conviser and Pelletier got together. At this time Harcourt was still selling its course in Georgia. BRG and Harcourt entered into a written agreement on April 22, 1980. This agreement gave BRG and exclusive license to market Harcourt's multi-state materials as part of BRG's course. BRG was granted and exclusive license to use Harcourt's trade name "Bar/Bri" in Georgia. Harcourt agreed that it would no longer offer a bar review course in Georgia and that it would not compete with BRG in Georgia.

BRG agreed not to compete with Harcourt outside Georgia.

Immediately after the 1980 agreement was executed, the price of BRG's course skyrocketed for $150 to over $400.[52] In February, 1982, a class action lawsuit was brought by a group of Georgia law students against the same defendants named in the instant suit, alleging precisely the same antitrust violations alleged herein.[53] This action was concluded by a settlement offering partial refunds to class members. The class included those taking BRG's course between April 22, 1980 up to June 15,

[52] The record does not disclose what prices Harcourt or other companies were charging for similar bar review courses.

[53] This action was Edwards, et al. v. BRG of Georgia, Inc., et al., Middle District of Georgia, Circuit A, No. 82-13-Ath).

1984.

During the pendency of the first class action, BRG and Harcourt executed a modified agreement. This was in 1982. First, the original agreement was changed so that BRG no longer had the stated exclusive right to market Harcourt's multi-state materials in Georgia. However, BRG retained the exclusive right to use the name "Bar/Bri" in connection with its course. Second, the modified agreement dropped the express covenants not to compete which had been contained in the initial agreement. Since the 1982 agreement was executed Harcourt has not competed with BRG in Georgia, and has not licensed its multi-state materials for use by any other Georgia bar review course.

In 1979, the vast majority of

University of Georgia law students who took a bar review course conducted in Athens, Georgia, took either the Harcourt or the BRG course. The record contains no similar data for subsequent years. The BRG course is marketed statewide, and is conducted at various locations in Georgia including Athens and Atlanta. Other bar review courses are offered to Georgia bar applicants, namely, the "NORD" and "PMBR" courses, but the record does not describe those courses.

In the instant action, Plaintiffs seek to represent a class consisting of those who attended a BRG course in Athens, Georgia, between June 15, 1984 and the present. Counts one through four each allege violations of §1 of the

Sherman Act, 15 U.S.C. §1.[54] A different theory of per se liability is advanced under each of these counts, namely, "price-fixing cartel" (count one); market/customer allocation (count two); boycott/concerted refusal to deal (count three); and "unreasonable joint venture" (count four).[55]

Counts five through nine of the complaint each allege violations of §2 of

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[54] §1 of the Sherman Act provides: "Every contract , combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...."

[55] The court notes that these theories are improperly pled as separate counts. Plaintiffs have one cause of action for alleged violation of §1 of the Sherman Act. However, for the ease of reference, the court will refer to the designations chosen by Plaintiffs.

the Sherman Act, 15 U.S.C. §2.[56] The allegations are: conspiracy to monopolize in Georgia (count five); attempt to monopolize in Georgia (count six); monopoly in Georgia (count seven); conspiracy to monopolize nationwide (count eight); and attempt to monopolize nationwide (count nine).

In an antitrust case, a party opposing summary judgment must come forward with "specific facts showing that there is a genuine issue for trial." Matsushita Electric Industrial Co. v. Zenith Radio Corp., __U.S.__, 106 S.Ct. 1348, 89 L.Ed. 538 (1986) (emphasis by

[56] §2 of the Sherman act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed [to have violated this Act]...."

court). This requires a showing of "significant, probative evidence of the existence of genuine issues of fact." Amey, Inc. v. Gulf Abstract and Title, Inc., 758 F.2d 1486, 1488 (11th Cir. 1985), cert. denied, __U.S.__, 106 S.Ct. 1513 (1986).

Plaintiffs have addressed counts eight and nine in their briefs in opposition to Defendants' motion, and have not filed any evidentiary materials pertinent to those counts in opposition to the motion. Accordingly, Defendants' motion for summary judgment is GRANTED on counts eight and nine.

The court now turns to counts one through four. Generally, a plaintiff asserting a claim under §1 of the Sherman Act must prove that the defendants' acts or conduct had an anticompetitive effect

in relevant geographic and product markets. See, Standard Oil Co. v. United States, 337 U.S. 293 (1949). Because plaintiff bears the burden of proof, it must make a factual showing in support of these elements where the defendant moves for summary judgment. Celotex Corp. v. Catrett, __U.S.___, 106 S.Ct. 2548, 91 L.Ed. 265 (1986).

However, where the defendant's complained of acts and conduct fit certain judicially recognized categories, plaintiff need not establish that the defendant's conduct actually had an anticompetitive effect, and neither need the plaintiff establish the relevant geographic and product markets. Anticompetitive effect in the marketplace is presumed, and the defendant is automatically liable for any damages

suffered by plaintiff, hence, the term "per se liability." The rationale is that the designated conduct is so inherently and reliably anticompetitive that its anticompetitive effects may be presumed, rather than proven. Thus, the plaintiffs in the instant case seek to denominate the agreements and dealings between BRG and Harcourt as arrangements of the type as to which per se liability has been recognized, namely, price fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); market and customer allocation, United States v. Topco-Associates, Inc., 405 U.S. 596 (1972); boycott/concerted refusal to deal, Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457 (1941); and unreasonable joint venture, Citizen Publishing Co. v. United

States, 394 U.S. 131 (1969).

The court finds that the arrangement between BRG and Harcourt does not fit within any recognized category of per se liability. First, the agreement is not a classic form of price fixing where two competitors agree what price they will charge for their products. On the contrary, neither agreement explicitly addresses the factor of price, and Harcourt has never had any right under either the 1980 or 1982 agreement to be consulted about the price of the BRG course. While it is true that the agreement of two competitors to "pool" their price may exert an upward influence on price, such an agreement is not inherently anticompetitive, and in a given setting could actually be procompetitive.

Neither agreement between BRG and Harcourt constitutes the sort of market or customer allocation agreement which has been recognized as a basis for per se liability. Cf. Topco, 405 U.S. 596. This is not a situation where competitors divided up a market in which both have previously done business, each taking a portion of the market. BRG has never done business outside the state of Georgia, and nothing in the record suggests it ever intended to do so. Harcourt as noted has done business virtually nationwide, but withdrew from the Georgia market following the 1980 agreement between BRG and Harcourt. Thus, the only market ever claimed by both Defendants is the state of Georgia, and clearly the state of Georgia was not divided up under either the 1980 or 1982

agreements.

The Defendants' asserted conduct plainly does not constitute a boycott or concerted refusal to deal. Cf. Zenith Radio Corp. v. Hazeltine Research, Inc., 39 U.S. 100 (1969); Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457 (1941). Plaintiffs' attempt to invoke this theory by arguing that the agreement prohibits BRG from hiring certain law lecturers is unavailing, because Plaintiffs have no standing to raise this argument.

Finally, the conduct described in the record differs from that recognized in Citizen Publishing Co. v. United States, 394 U.S. 131 (1969), as an unreasonable joint venture which was per se illegal. In the instant case, BRG and Harcourt did not pool capital and

Harcourt has no risk of loss on the Georgia bar review course. Thus, the arrangement created was not a joint venture and the Citizens Publishing theory is inapplicable here.

Because no theory of per se liability applies to the claims under §1 of the Sherman Act, Plaintiffs may only prevail by showing evidence that Defendants' arrangements had an anticompetitive effect in relevant geographic and product markets. Although the manner in which the Plaintiffs pled their complaint implies they have elected to forego this option, the court will nonetheless allow them thirty (30) days within which to file such evidence and briefs as they may wish to file addressing these elements. In the meantime, Plaintiffs' motion for partial

summary judgment is DENIED; Defendants' motion for summary judgment on counts two through four is GRANTED; and the court DEFERS ruling on Defendants' motion for summary judgment as to count one.

The court now turns to counts five through seven which are brought under §2 of the Sherman Act. Count five alleges a conspiracy to monopolize in Georgia; count six alleges an attempt to monopolize in Georgia; and count seven alleges monopoly in Georgia. While Defendants have made various arguments with respect to these counts, the Court will only address Defendants' arguments of insufficient evidence of (1) relevant product and geographic markets, and (2) monopoly power or dangerous probability of monopoly. Proof of the relevant geographic and product market is

essential to all §2 claims. See American Key Corp. v. Cole Nat. Corp., 762 F.2d 1569, 1579 (11th Cir. 1985) (conspiracy to monopolize); United States v. Grinnell Corp., 384 U.S. 563 (1966) (monopolization and attempted monopolization).

The entirety of Plaintiffs' effort to identify proper product and geographic markets is contained in the affidavit of Dr. William Henry, filed in opposition to Defendants' motion for summary judgment. The affidavit states:

> Dr. William Henry, being duly sworn, deposes and says:
>
> 1.
>
> I am Professor of Finance in the College of Business Administration at Georgia State University with a Ph.D. degree in economics from North Carolina State University, and give this affidavit in the above-captioned matter.

2.

I have reviewed the depositions of the plaintiffs in this action, the deposition of Ronald Pelletier, the enrollment contracts produced by the defendants, and the deposition of Professor David Kamerschen, taken in the case of Edwards et al. v. BRG of Georgia, Inc., C.A. No. 82-13-Ath together with the exhibits thereto.

3.

Upon review of the depositions of the named plaintiffs and the deposition of Ronald Pelletier it is apparent that nearly all students at the University of Georgia School of Law take the defendants' bar review course. Because the students taking the course are also enrolled as full-time students at the law school in Athens, it is not realistic to expect that they could reasonable [SIC] take a course offered outside the Athens area. Further, Ronald Pelletier testified that defendants accounted for at least eighty percent of the sales of bar review courses in the Athens area.

4.

I conclude that a comprehensive bar review course which includes lectures and written material offered in Athens, Georgia to prepare students to take the Georgia bar examination is the relevant product market and that Athens is a relevant geographic market for purposes of economic analysis. I further conclude that defendants and have had the power to control prices in the market, and that defendants therefore have monopoly power in the relevant geographic and product markets.

This 12th day of May, 1986.

/s/ William R. Henry
Dr. William Henry

Dr. Henry's affidavit is insufficient to identify or justify a proper product of geographic market. A relevant product market includes those goods or services with which defendant's product effectively competes. In Re: Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436, 442-43 (5th

Cir. 1982). Dr. Henry's affidavit asserts only that "a comprehensive bar review course which includes lectures and written material offered in Athens, Georgia to prepare students to take the Georgia bar examination is the relevant product market." Assuming that this seeks to identify a "market" rather than a "product," Dr. Henry fails to state how he arrived at this conclusion. Apparently, Dr. Henry considers that bar review courses which include only written materials are not within the relevant product market, and that comprehensive courses offered, for example, in Atlanta outside the normal school year are not included within the relevant product market. Particularly because Dr. Henry has chosen to define the product market in such a narrow and seemingly artificial

manner, the lack of justification for his conclusion renders it valueless.

The relevant geographic market is the geographic area of "effective competition" for the product in question. American Key Corp., 762 F.2d at 1581. Dr. Henry's affidavit is similarly deficient to identify the relevant geographic market. The affidavit does not address at all the area in which the product is offered, but rather limits its consideration to the place where the course is administered during the school year. Since the record discloses that BRG's course is marketed statewide, and is offered at various statewide locations both during the school year and following the close of the school year, Dr. Henry's conclusion that Athens, Georgia is a relevant submarket is without evidentiary

value.

Although Plaintiffs' failure to properly identify relevant product and geographic markets requires the grant of summary judgment as to counts five through seven, counts six (attempt to monopolize in Georgia) and seven (monopoly in Georgia) fail for additional reasons. To prove a claim of monopoly (count seven), an antitrust plaintiff must prove monopoly power, i.e., the power or ability to fix or control prices in the relevant market or to exclude competition form the market. United States v. Grinnell Corp., 384 U.S. 563 (1966). To prove an attempt to monopolize (count six), an antitrust plaintiff must prove the existence of a "dangerous probability" of establishment of monopoly. American Tobacco Co. v.

United States, 328 U.S. 781 (1946). Plaintiffs' only effort to show evidence of theses elements is the conclusory statements of the named Plaintiffs that they had "no other choice" that the BRG course when they took it in February 1984 in Athens, and the statement in Dr. Henry's affidavit "Further, Ronald Pelletier testified that Defendants accounted for at least 80% of the sales of bar review courses in the Athens area." Plaintiffs' assertions are clearly insufficient. In addition, the relevant portion of Mr. Pelletier's deposition reflects that he was referring to the year 1979, and that his reference was to courses administered, not offered or sold, in Athens. Pelletier Deposition, p. 51.

The admittedly large increase in the

price of BRG's course after the 1980 agreement was executed is not evidence of market power, particularly where the record fails to reflect what prices were being charged at that time for other bar review courses.

Accordingly, Defendants' motion for summary judgment is hereby GRANTED as to counts two through nine. Plaintiff's motion for partial summary judgment is DENIED. The court DEFERS ruling on Defendants' motion for summary judgment insofar as it pertains to count one. The clerk is hereby DIRECTED to resubmit the motion within thirty (30) days from the date of entry of this order. Should Plaintiffs elect to file further evidentiary materials within that time, the court will then set a time within which Defendants may respond.

SO ORDERED, this 9 day of January, 1987.

/s/Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

[APPENDIX D]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAY PALMER; MICHAEL CHIDISTER;
TREI L. POWERS; DAVID DUNBAR
WILLIAM FURGUSON; BENJAMIN FIRST

vs. CIVIL NO. C85-4377

BRG OF GEORGIA, INC., a Georgia Corporation (d/b/a "BAR/BRI" in Georgia); BAR REVIEW, INC., a Georgia corporation; BRG PUBLICATIONS, INC., a Georgia Corporation; HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC., a Delaware Corporation (d/b/a "BAR/BRI" nationally); RONALD O. PELLETIER

ORDER

This antitrust suit is before the court on Plaintiffs' motion for class certification. Plaintiffs are six graduates of the University of Georgia Law School who took Defendant BRG's bar review course in Athens, Georgia, in January/February, 1985. They contend the

price of the course was artifically inflated due to Defendants' alleged antitrust violations. They seek to represent a class consisting of all persons who took the BRG course in Athens, Georgia, on or after June 15, 1984. By previous order filed June 3, 1986, the court deferred consideration of the instant motion.

By order of even date herewith, Defendants' motion for summary judgment has been granted on all counts except one. As to the remaining count, the court has held that the only theory clearly pled in Plaintiffs' complaint--that of *per se* liability--is unavailing. However, Plaintiffs have been allowed an additional thirty days within which to proceed on an alternative theory. The court expects that a decision to proceed

on the alternative theory would require a much greater degree of financial commitment to this case than Plantiffs' depositions reflect that they have. At this juncture, Plaintiffs only state that they are only capable of assuming the cost of mailing notice to approximately 280 absent class members.

Rule 23(a), Fed.R.Civ.P., requires that parties seeking to represent a class demonstrate that they will adequately protect the interests of the class. Because Plaintiffs may lack financial committment sufficient for adequate investigation and trial preparation in light of the court's ruling, the court finds that certification of the class would be improper at this juncture. Accordingly, the motion for class certification is hereby DENIED.

SO ORDERED, this 9 day of January, 1987.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

[APPENDIX E]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAY PALMER; MICHAEL CHIDISTER; TREI L. POWERS; DAVID DUNBAR WILLIAM FURGUSON; BENJAMIN FIRST

vs. CIVIL NO. C85-4377

BRG OF GEORGIA, INC., a Georgia Corporation (d/b/a "BAR/BRI" in Georgia); BAR REVIEW, INC., a Georgia corporation; BRG PUBLICATIONS, INC., a Georgia Corporation; HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC., a Delaware Corporation (d/b/a "BAR/BRI" nationally); RONALD O. PELLETIER

ORDER

This antitrust suit is now before the court pursuant to this court's order of January 9, 1987, as well as Plaintiffs' motion for reconsideration and Plaintiffs' motion to strike and for additional discovery.

Plaintiffs filed the present action

on November 4, 1985, alleging violations of §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and sought certification as a class action.

The parties filed cross motions for summary judgment. On January 9, 1987, the court denied Plaintiffs' motion for summary judgment, granted Defendants' motion for summary judgment on counts two through nine, and deferred summary judgment on count one to permit filing of additional materials.[57]

The court first notes that Plaintiffs' motion is much broader in scope than the parameters set by the court's order of January 9. Plaintiffs were given leave to supplement the record

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[57] The order of January 9, 1987 set out fully the pertinent facts and the court's reasoning, which will not be repeated herein.

as to count one with evidence and argument that Defendants' contract has an anticompetitive effect in relevant geographic and product markets. Plaintiffs have done this; the new evidence and arguments as to count one will be considered below. However, the parties' cross motions for summary judgment as to counts two through nine will not be reconsidered. Neither will the court reconsider Plaintiffs' motion for class certification.

Turning to the new evidence offered in connection with a rule of reason theory in count one, it is first necessary to rule on motions to strike certain of the evidence. Plaintiffs move to strike the affidavit of Richard F. Duffy, Vice-President and Treasurer of Defendant Harcourt, which Defendants

filed on March 12, 1987. The gist of the affidavit is that the price paid by the named Plaintiffs to Defendant BRG for their 1985 course was not that high in comparison with prices paid for bar review courses in 39 other states where Harcourt markets or licenses a course. Rather, it was an intermediate price. Additionally, the affidavit states that No[illegible] is advertising a review course for the 1987 Georgia bar exam at a cost of $636, and that it consists of 200 hours of audio cassette instruction, of which 40 hours relate to the Georgia law portion of the exam.

Plaintiffs' arguments that the affidavits should be stricken because it contains hearsay and is speculative is not well taken. Plaintiffs alternative request for additional discovery is

denied because the discovery identified as needed does not relate to matters covered by Mr. Duffy's affidavit. Specifically. Plaintiffs state that they wish further discovery concerning the "pricing practices and market share of HBJ [Harcourt] in other states...." Accordingly, the motion to strike Mr. Duffy's affidavit is denied; the request for additional discovery is denied.

In their brief of law filed May 13, 1987, Defendants have asked the court to disregard an evidentiary submission of Plaintiffs which was filed May 7, 1987. The referenced evidentiary submission is entitled "Plaintiffs' Brief of Newly Discovered Materials Submitted in Response to the Court's Order and in Support of Plaintiffs' Motion for Reconsideration." It consists partly of

the affidavit of David Naylor, a third year law student at Woodrow Wilson School of Law in Atlanta. The gist of the affidavit is that BRG has once again increased the price of its bar review course from $795 to $855 effective May 15. Also, Plaintiffs offer a copy of a jury charge recently given by the undersigned in a criminal bid rigging case under §1 of the Sherman Act, claiming it "conflicts" with the January 9, order herein. The criminal jury charge has no relevance at all to the issues presently before the court; it is hereby stricken. The objection to the Naylor affidavit is overruled.

In support of their claim that relief should be granted under a rule of reason theory, Plaintiffs have filed a number of affidavits and supporting data.

The question before the court is whether Plaintiffs have offered "significant, probative evidence," Amey, Inc. v. Gulf Abstract and Title, Inc., 758 F.2d 1486, 1488 (11th Cir. 1985), cert. denied, __U.S. __, 106 S.Ct. 1513 (1986), that the Defendants' 1980 agreement as modified in 1982 has an anticompetitive effect in relevant geographic and product markets. January 9, 1987 Order, p. 9.

On the issue of anticompetitive effect, the Plaintiffs offered the contract itself, the fact that the price went up after the contract was signed, and the affidavit of Leon Van Gelderen, a Georgia State School of Law graduate.

As stated in the January 9 order, the contract between BRG and Harcourt was amended in 1982 to make BRG's license

nonexclusive and to delete the covenants not to compete. Therefore, since 1982, the contract on its face has not contained anticompetitive provisions. It does not reflect that BRG purchases the multi-state materials from Harcourt, pays harcourt a fee, and uses Harcourt's trade name "BAR/BRI." Under the circumstances, it is fair to conclude that the possibility of anticompetitive effect exists, but that such effect cannot be presumed from the contract itself.

Further, the fact that the price of BRG's course went up significantly after the 1980 contract was signed does not suffice to demonstrate anticompetitive effect, when the price increase came on the heels of West Publishing's withdrawing the free multi-state materials which previously had been

provided free to BRG. It is clear that the multi-state materials constitute a major part of the BRG review course, and it is safe to assume that there are costs associated with developing or acquiring multi-state examination materials. On the instant record, it is as reasonable to assume that the price increase reflected these additional costs as it is to assume that the higher prices were merely to gouge the consumers.

The affidavit of Van Gelderen does not add significant evidence on the issue of anticompetitive effect. It only states that he took a comprehensive bar review course in the state of Washington in 1985 from a competitor of BAR/BRI; the cost was $290. The BAR/BRI course then offered in the state of Washington was $300. The limited import of the

testimony is offset by Mr. Duffy's affidavit in which he states that while the prices stated by Van Gelderen are correct, they were nearly the lowest prices in the 40 states in which Harcourt offers or licenses bar review courses.

The issues of relevant product market and relevant geographic market are addressed in an affidavit of Dr. William Henry filed February 9, 1987. The additional affidavit of Dr. Henry states that the relevant product market is "comprehensive bar review courses that prepare students to take the Georgia bar examination." He states that the relevant geographic market is "Athens, Georgia during the winter academic term of law school." The affidavit does not define the term "comprehensive bar review courses," but rather seems to assume that

these are courses having the attributes of BRG's course. Thus, it is uncertain whether (for example) an audio cassette course or written materials covering both multi-state and Georgia law portions would constitute a "comprehensive bar review course." The court notes various materials submitted by Plaintiffs reflecting the views of Athens law students that the BRG course is the only "all inclusive" course available. While these perceptions are relevant in defining product market, they are not a substitute for expert analysis.

The Court further finds that "Athens, Georgia during the winter academic term of law school" is not a relevant geographic market. The temporal limitation is inappropriate. Further, the geographic area is too small,

particularly given that the number of consumers within the area is quite small. The court reflects that in 1985-1986, 181 graduates of the University of Georgia took the Georgia bar exam. Finally, the Defendants' contract anticipated that the BRG course would be offered statewide, which it is. Thus, the alleged anticompetitive effect of the contract is more appropriately measured statewide.

The court finds that there is not significant, probative evidence before it that the modified contractual arrangement has a present anticompetitive effect in a relevant geographic and product market. Accordingly, Defendants' motion for summary judgment on count one is GRANTED. Plaintiffs, motion for summary judgment on count one is DENIED. All claims having been ruled on, the clerk is hereby

DIRECTED to enter judgment in favor of Defendants.

SO ORDERED, this 8 day of July, 1987.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES
DISTRICT JUDGE

[APPENDIX F]

Jay PALMER, et al.,
Plaintiffs-Appellants,
v.
BRG OF GEORGIA, INC., a Georgia Corporation, d/b/a BAR/BRI, et al.,
Defendant-Appellees.

No. 87-8804.

United States Court of Appeals,
Eleventh Circuit.

O R D E R:

Bryan Downs', President of the Student Bar Association of the University of Georgia School of Law, on behalf of the Student Bar Association, and Margaret Murphy's, Vice President of the Third Year Class of the University of Georgia School of Law, on behalf of the third year class, motion for leave to file brief as amicus curiae in support of appellants' petition for panel rehearing and rehearing in banc is **granted.**

The United States of America's

motion for leave to file amicus curiae in support of suggestion of rehearing in banc is **granted.**

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE